No. 17-6075 *** CAPITAL CASE ***	
Title:	**Keith Tharpe, Petitioner** **v.** **Eric Sellers, Warden**
Docketed:	September 23, 2017
Linked with 17A330	
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Numbers:	(17-14027)
Decision Date:	September 21, 2017

DATE	PROCEEDINGS AND ORDERS
Sep 23 2017	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 23, 2017)
Sep 23 2017	Application (17A330) for a stay of execution of sentence of death, submitted to Justice Thomas.
Sep 26 2017	Brief of respondent Eric Sellers, Warden in opposition filed.
Sep 26 2017	Application (17A330) referred to the Court.
Sep 26 2017	Reply of petitioner Keith Tharpe filed.
Sep 26 2017	Application (17A330) granted by the Court. The application for stay of execution of sentence of death presented to Justice Thomas and by him referred to the Court is granted pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. Justice Thomas, Justice Alito, and Justice Gorsuch would deny the application.
Oct 02 2017	DISTRIBUTED for Conference of 10/6/2017.
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Dec 04 2017	DISTRIBUTED for Conference of 12/8/2017.
Dec 26 2017	DISTRIBUTED for Conference of 1/5/2018.
Jan 08 2018	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. Judgment VACATED and case REMANDED. Opinion per curiam. (Detached **Opinion**). Justice Thomas, with whom Justice Alito and Justice Gorsuch join, dissenting. (Detached Opinion).
Feb 09 2018	JUDGMENT ISSUED.

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No. 17-

IN THE SUPREME COURT OF THE UNITED STATES

RECORD AND BRIEFS

October Term, 2017

KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, WARDEN
Georgia Diagnostic Prison,

Respondent.

THIS IS A CAPITAL CASE

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

"In my experience, there are two types of black people: 1. Black folks and 2. Niggers . . . . Because I knew the victim and her husband's family and knew them all to be good black folks, I felt Tharpe, who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did. . . . After studying the Bible, I have wondered if black people even have souls." – Sworn testimony of Barney Gattie, a white juror who voted to impose Keith Tharpe's death sentence.

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QUESTIONS PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

Petitioner is scheduled to die on September 26, 2017, despite evidence that racism played in pivotal role in his death sentence. No court has addressed this claim on the merits, even though it was first raised in post-conviction proceedings almost twenty years ago.

A few years after trial, a juror who had voted to impose death told Petitioner's state habeas attorneys that he had favored the death penalty because Petitioner was a "nigger" who had killed someone the juror considered "'good' black folk," and that his Bible study had led him to "wonder[] if black people even have souls." The state habeas court ruled these statements and other proof evincing the juror's racist beliefs and their impact on Petitioner's sentence inadmissible under Georgia's evidence rule barring jurors from impeaching their verdict, and found Petitioner's juror-bias claim procedurally defaulted. In federal habeas corpus proceedings, the district court adopted the state courts' procedural default ruling, a finding left undisturbed on appeal.

Last term, this Court decided two cases bearing on Petitioner's claim. In *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017), the Court held that a state's no-impeachment rule may not bar consideration of evidence "that racial animus was a significant motivating factor in [a] juror's vote to convict." In *Buck v. Davis*, 137 S. Ct. 759, 778 (2017), the Court recognized that the possibility that someone "may have been sentenced to death because of his race" was an "extraordinary circumstance" warranting relief from judgment under Fed.R.Civ.Proc. 60(b)(6). Invoking *Pena-Rodriguez* and *Buck*, Petitioner moved under Rule 60(b) to reopen the judgment in his case.

The district court denied the motion. It held that *Pena-Rodriguez* was a new rule of criminal procedure that could not be applied retroactively under *Teague v. Lane*, 489 U.S. 288 (1989), and that, regardless, the state court's conclusion that Petitioner had not shown prejudice sufficient to overcome any procedural default satisfied the standard set forth in *Pena-Rodriguez*, even though the state court in Petitioner's case did not have the benefit of this Court's guidance in that case and had not actually considered any of the evidence showing the juror's racial bias.

A panel of the Eleventh Circuit denied a certificate of appealability, finding (1) that Petitioner had not shown that the district court abused its discretion in denying the Rule 60(b) motion because the court "applied the correct legal standard and based its decision on findings of fact not clearly erroneous"; (2) that, assuming *Pena-Rodriguez* applied retroactively, Petitioner had not "made a substantial showing of the denial of a constitutional right" because he "failed to demonstrate that [the juror's] behavior 'had a substantial and injurious effect or influence in determining the jury's verdict'" or that reasonable jurists would find the district court's ruling debatable; and (3) that "[i]f [Petitioner] is correct that *Pena-Rodriguez* applies retroactively in post-conviction proceedings and thus gives rise to a constitutional claim he could not have brought to the [state habeas court], he is now free to pursue the claim in state court." The federal courts' rulings give rise to the following important questions:

1. Could reasonable jurists disagree with the district court's rejection of Petitioner's Rule 60(b) motion and, accordingly, did the Eleventh Circuit err in denying a certificate of appealability?

2. Given Petitioner's credible evidence that a juror voted for the death penalty because he is a "nigger," did the Eleventh Circuit err in ruling that he failed to make "a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2).

3. Did *Pena-Rodriguez* create a new constitutional claim and, if not, did the lower courts err in denying Petitioner's motion for relief from judgment under Rule 60(b)(6)?

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No. 17-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

KEITH THARPE,

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ERIC SELLERS, WARDEN
Georgia Diagnostic Prison,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

Petitioner, Keith Tharpe, respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Eleventh Circuit Court of Appeals, entered in the above case on September 21, 2017. *See* Appendix A.

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals, entered September 21, 2017, denying Mr. Tharpe's Application for a Certificate of Appealability is not yet reported, but is attached hereto as Appendix A. The unpublished decision of the district court denying Mr. Tharpe's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6), dated September 5, 2017, is appended as Appendix B. The Eleventh Circuit's published decision

affirming the district court's denial of habeas relief is attached hereto as Appendix C. The district court's prior decision in *Tharpe v. Humphrey*, Case No. 5:10-CV-433 (M.D.Ga.), denying habeas relief, dated March 6, 2014, is attached hereto as Appendix D. The district court's order finding Mr. Tharpe's juror-bias claim procedurally defaulted is attached as Appendix E hereto. The underlying state habeas court order in *Tharpe v. Hall*, Butts Co. Superior Court Case No. 93-V-144, denying habeas relief is unreported and attached hereto as Appendix F. The Georgia Supreme Court's order denying discretionary review of the state habeas court's decision is unreported and attached hereto as Appendix G.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals denying Petitioner's application for a certificate of appealability was entered on September 21, 2017. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254, Petitioner asserting a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime...nor be deprived of life, liberty, or property without due process of law...." U.S. Const. amend. V.
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...." U.S. Const. amend. VI.
>
> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.
>
> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person

of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV §1.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253 provides in pertinent part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Federal Rule of Civil Procedure 60 provides in pertinent part:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: ... (6) any other reason that justifies relief.

STATEMENT OF THE CASE

A. The Trial.

Petitioner, Keith Tharpe, is currently under sentence of death in Georgia following a jury trial conducted in Jones County, Georgia, about three months after his arrest, in early January 1991.[1] The entirety of the guilt and penalty phases took place January 8-10, 1991. During voir dire, Mr. Tharpe's counsel raised a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), based on the district attorney's use of peremptory strikes against five of eight qualified

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[1] Mr. Tharpe was tried for offenses stemming from the September 25, 1990, murder of his sister-in-law Jackie Freeman and sexual assault of his estranged wife Migrisus Tharpe, while under the influence of drugs. *Tharpe v. State*, 262 Ga. 110, 110-11 (1992).

black venire members available for challenge, as well as the prosecutor's notorious history of race discrimination.[2] Dkt. No. 11-11 at 130-31. The trial court accepted the district attorney's race-neutral responses and the trial proceeded. Dkt. No. 11-11 at 145.

Prior to the *Batson* challenge, prospective juror Barney Gattie was questioned by the State and defense. Dkt. No. 11-3 at 85-99. Mr. Gattie testified that he had no preconceived notions about the case, that he did not know the victims, and that his only connection to any party was that Mr. Briley sometimes bought oysters at his seafood shop. Dkt. No. 11-3 at 95. Mr. Gattie was ultimately selected to serve on the jury. Dkt. No. 11-11 at 118-19. After convicting Mr. Tharpe, the jury heard evidence in aggravation and mitigation to inform their decision whether to sentence Mr. Tharpe to death or a parole-eligible life sentence. In aggravation, the State presented evidence that Mr. Tharpe had been convicted as a habitual traffic offender.[3] In mitigation, his attorneys presented brief testimony from a number of family members, including his wife Migrisus. The jury ultimately sentenced Mr. Tharpe to death. His convictions and sentence were affirmed by the Georgia Supreme Court on March 17, 1992. *Tharpe v. State*, 262 Ga. 110 (1992), cert. denied, *Tharpe v. Georgia*, 506 U.S. 942 (1992).

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[2] By the time of Mr. Tharpe's trial, Ocmulgee Circuit District Attorney Joseph Briley had already been found to have used peremptory strikes in a discriminatory manner under the stringent standard of *Swain v. Alabama*, 380 U.S. 202 (1965), which imposed a higher burden than *Batson*, specifically requiring a showing of the prosecuting attorney's history of discriminatory tactics. *See* Dkt. No. 12-6 at 57-61 (Brief of Appellant, *Tharpe v. State*); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991). Mr. Briley's history of discrimination included authoring a memo providing instruction to other attorneys about how to underrepresent African Americans and women on grand and traverse jury lists while still avoiding legal challenges. *See Amadeo v. Zant*, 486 U.S. 214, 217-18 (1988).

[3] *See Tharpe v. Head*, 272 Ga. 596 (2000).

B. State Habeas Proceedings

Mr. Tharpe filed his state habeas corpus petition on March 17, 1993; it was subsequently amended on December 31, 1997, and January 22, 1998. In May of 1998, Mr. Tharpe's state habeas counsel from the Georgia Resource Center conducted juror interviews. On May 16, 1998, attorneys Diana Holt and Laura-Hill Patton interviewed juror Barney Gattie at his home in Gray, Georgia. The visit lasted approximately one hour. Dkt. No. 15-16 at 23; Dkt. No. 77-6 at ¶ 2 (Affidavit of Laura Hill-Patton). Ms. Patton testified to her recollection of the interview:

> Mr. Gattie expressed his feelings about the case in general. He stated that there are two kinds of black people in the world – "regular black folks" and "niggers." Mr. Gattie noted that he understood that some people do not like the word "nigger" but that is just what they are, and he "tells it like he sees it." According to Mr. Gattie, if the victim in Mr. Tharpe's case had just been one of the niggers, he would not have cared about her death. But as it was, the victim was a woman from what Mr. Gattie considered to be one of the "good black families" in Gray. He explained that her husband was an EMT. Mr. Gattie stated that that sort of thing really made a difference to him when he was deciding whether to vote for a death sentence.

Id. This was consistent with attorney Diana Holt's recollection of the interview. Dkt. No. 15-16 at 19; Dkt. No. 77-7 at ¶ 7 (Affidavit of Diana Holt). Ms. Holt further recalled: "Mr. Gattie said that he was congratulated for a good job as a juror on this case by some folks in the community. He said that one of the victim's family members had even told him, 'Thanks for sending that nigger to the chair.'" Dkt. No. 15-16 at 20; Dkt. No. 77-7 at ¶ 11. The interview ended cordially with Mr. Gattie's wife offering the attorneys fried green tomatoes and inviting them to stay for dinner.[4] Dkt. No. 15-16 at 20-21; Dkt. No. 77-7 at ¶ 13.

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[4] Both Ms. Holt and Ms. Patton are white women, as is Laura Berg, another lawyer from the Georgia Resource Center, who accompanied Ms. Holt on a later visit with Mr. Gattie.

On May 25, 1998, Ms. Holt returned to Mr. Gattie's house with another Resource Center attorney, Laura Berg, as well as a draft affidavit based on Mr. Gattie's statements during the initial interview. Mr. Gattie asked the attorneys about other jurors they had sought to interview. When Ms. Holt mentioned they were having difficulty finding one juror, Tracy Simmons, who had moved out of state, Mr. Gattie stated: "you mean the nigger who used to live over by Juliette, Georgia. Yeah, I know who you are talking about, that nigger worked at the Bibb Company Plant in Forsyth until it closed."[5] Dkt. No. 15-16 at 21; Dkt. No. 77-7 at ¶ 14. Ms. Holt proceeded to ask Mr. Gattie to review the draft affidavit.

> I asked Mr. Gattie if I could read his statement to him, explaining that it was my practice to read witnesses their statements, and he agreed. He asked what I was going to do with it, and I told him I wouldn't do anything with it unless he approved it and confirmed the accuracy of it. He said, "well, go ahead. Let's here [sic] what you got there." I read the statement from beginning to end to him, including the preface declaring that Mr. Gattie was swearing to the following information. After each point, I looked at him and asked him if the statement was right. He nodded or said, "yes" after each point, except for one point related to the origin of integration. I corrected the statement on that point to reflect Mr. Gattie's actual words. He confirmed the accuracy of every word of the rest of the statement. He did not request any further changes to his statement. At the conclusion of my reading of Mr. Gattie's statement to him, I asked him if it was entirely accurate. He said it was. I also asked him if there were any changes he wanted to make to the statement. He said that there were not... I handed the statement to Mr. Gattie and asked if he wanted to read it. He said he didn't have his glasses and what I read was what he had said. After Ms. Berg swore Mr. Gattie, he signed the statement in Ms. Berg's presence, and she notarized it on the spot.

Dkt. No. 15-16 at 21; Dkt. No. 77-7 at ¶ 15.[6] Ms. Holt's recollection corroborates Mr. Gattie's affidavit, sworn to and signed that day, which included his amendment striking the term

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[5] Tracy Simmons was one of the two African Americans who served on Mr. Tharpe's jury. *See* Dkt. No. 15-8 at 7.

[6] Ms. Berg's recollection is consistent with Ms. Holt's. *See* Dkt. No. 15-16 at 1-11; Dkt. No. 77-8 at ¶ 3 (Affidavit of Laura M. Berg).

"interracial marriages" and replacing it with the handwritten word "integration," which he initialed. Dkt. No. 15-8 at 130; Dkt. No. 77-2 at ¶ 3 (Affidavit of Barney Gattie). The affidavit further summarized his racial views as he had described them to Ms. Holt and Ms. Hill-Patton during their initial interview:

> 3. I also knew the girl who was killed, Mrs. Freeman. Her husband and his family have lived in Jones county a long time. The Freemans are what I would call a nice Black family. In my experience I have observed that there are two types of black people: 1. Black folks and 2. Niggers. For example, some of them who hang around our little store act up and carry on. I tell them, "nigger, you better straighten up or get out of here fast." My wife tells me I am going to be shot by one of them one day if I don't quit saying that. I am an upfront, plainspoken man, though. Like I said, the Freemans were nice black folks. If they had been the type Tharpe is, then picking between life or death for Tharpe wouldn't have mattered so much. My feeling is, what would be the difference? As it was, because I knew the victim and her husband's family and knew them all to be good black folks, I felt Tharpe, who wasn't in the "good" black folks category in my book, should get the electric chair for what he did. Some of the jurors voted for death because they felt that Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason. The others wanted blacks to know they weren't going to get away with killing each other. After studying the Bible, I have wondered if black people even have souls. Interracial ~~marriages~~ started in Genesis. I think they are wrong. For example, look at O.J Simpson. That white woman wouldn't have been killed if she hadn't have married that black man.

Id.[7] The following day, on May 26, 1998, state habeas counsel filed Mr. Gattie's affidavit and faxed a copy to opposing counsel. Dkt. No. 77-9 (Petitioner's Notice to Rely on Affidavits, May 26, 1998). The very next day, Mr. Gattie signed a second affidavit, this time on behalf of the Respondent. It characterized his interaction with Mr. Tharpe's attorneys in a manner at odds with counsel's recollections of what occurred, suggesting that Mr. Gattie had not understood the purpose of their visit and had been intoxicated at the time he signed his prior affidavit. Dkt. No. 15-17 at 13-15; Dkt. No. 77-3 at ¶ 1; 3 (Affidavit of Barney Gattie dated May 27, 1998). While he testified that the word "nigger" was not used during deliberations and that, at the time he served on Mr. Tharpe's jury, he had not known Mr. Tharpe was on probation at the time of the

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[7] Despite maintaining that he did not read the affidavit before signing it, Mr. Gattie admitted during his deposition testimony that he made and initialed the correction shown in this image. Dkt. No. 15-6, at 44-45; Dkt. No. 77-4 at 44-45.

crime and did not discuss an alleged prior shooting with other jurors, Mr. Gattie did not deny using the term "nigger" generally, nor did he disavow his belief that black people could be divided into two categories of "good black folks" and "niggers." *See id.* In addition to filing Mr. Gattie's counter-affidavit, Respondent also moved to exclude Mr. Tharpe's juror affidavits in their entirety as improper impeachment of the jury's verdict inadmissible under O.C.G.A. §§ 17-9-41 and 9-10-9. *See* Dkt. No. 13-17 at 4. Although the affidavits were admitted into the record at the May 28, 1998, evidentiary hearing, the state habeas court later held that they, along with other testimony, were inadmissible under Georgia's no-impeachment rule. *See* Dkt. No. 19-10 (Appendix F) at 99-101.

In the months that followed, counsel for Mr. Tharpe sought to depose all the jurors to determine the extent to which racial bias had infected his trial. Dkt. No. *** (Petitioner's Notice of Depositions, June 1, 1998). In turn, Respondent sought a protective order to prevent depositions. Dkt. No. 14-8 (June 2, 1998). Although the state habeas court initially granted the protective order (Dkt. No. 14-10), after a motions hearing on August 24, 1998, it agreed to allow the depositions in the court's presence so that it could rule on what questions about the jurors' racial views would be permitted. *See* Dkt. No. 15-2 at 1-2.

The depositions were conducted on October 1-2, 1998. *See* Dkt. Nos. 15-6 – 15-8. Eleven of the twelve jurors testified, and all denied that any racial bias was involved in the deliberations. As for Mr. Gattie, he again specifically denied only one statement contained in his initial affidavit – namely that he had disclosed to other jurors that Mr. Tharpe was on probation for a prior shooting. Dkt. No. 15-6 at 54-55; Dt. 77-4 at 54-55. Although he maintained that Mr. Tharpe's counsel did not properly identify themselves and that he was intoxicated at the time he signed his first affidavit, Mr. Gattie did not deny the accuracy of any other statements in his

initial affidavit and, indeed, testified that the only inaccurate statement in it concerned jury-room discussions of the alleged prior shooting.[8] Dkt. No.15-6 at 118-19; Dkt. No. 77-4 at 118-19.

At a subsequent evidentiary hearing held on December 11, 1998, Mr. Tharpe submitted affidavits from the attorneys who had interviewed Mr. Gattie initially (Laura-Hill Patton and Diana Holt) and who were present when his affidavit was executed (Diana Holt and Laura Berg). *See* Dkt. No. 15-16 at 10-13, 17-26; Dkt. Nos. 77-6, 77-7, and 77-8. These affidavits, which were admitted into evidence, reaffirmed Mr. Gattie's racial attitudes and contradicted his testimony regarding the circumstances under which the affidavit was obtained. The attorneys also testified that they had introduced themselves to Mr. Gattie as attorneys who were working on Mr. Tharpe's behalf. Dkt. No. 15-16 at 23; Dtk. No. 77-6 at ¶ 3 (Affidavit of Laura-Hill Patton); Dkt. No. 15-16 at 17-18; Dkt. No. 77-7 at ¶ 4 (Affidavit of Diana Holt). Contrary to Mr. Gattie's suggestion in his second affidavit and his deposition testimony that he was significantly intoxicated at the time he signed his first affidavit, "Mr. Gattie did not appear to be tired or alcohol-impaired at any time throughout our visit. He was alert and animated as Ms. Holt read him the affidavit and afterwards, as we chatted with him." Dkt. No. 15-16 at 12; Dkt. No. 77-8 at ¶ 8 (Affidavit of Laura M. Berg); *see also* Dkt. No. 15-16 at 211 Dkt. No. 77-7 at ¶ 15 (Affidavit of Diana Holt). The attorneys further testified that Mr. Gattie was well aware of the contents of the affidavit, which he had corrected and signed on May 25, 1998.

> Ms. Holt read the entire affidavit to Mr. Gattie in a clear, slow voice, stopping every couple of lines to ask Mr. Gattie to verify that what she had read was accurate. Every time Ms. Holt would stop for verification Mr. Gattie would tell her "that's right" or "I'm sticking to my story" or would reiterate the statement that Ms. Holt had just read.

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[8] Mr. Gattie nonetheless testified that some of the statements in the affidavits were "out of proportion." Dkt. No. 15-8 at 82; Dkt. No. 77-5 at 14.

Dkt. No. 15-16 at 10; Dkt. No. 77-8 at ¶ 3 (Affidavit of Laura M. Berg); *see also* Dkt. No. 15-16 at 21; Dkt. No. 77-7 at ¶ 15.

After these proceedings, Mr. Tharpe's state habeas case languished and several changes in attorneys on both sides occurred. On July 30, 2007, the court conducted an evidentiary hearing addressing Mr. Tharpe's intellectual disability claim pursuant to *Turpin v. Hill*, 269 Ga. 302 (1998). After submission of post-hearing briefing and proposed orders, the state habeas court issued a final order denying relief on all claims. Dkt. No. 19-10 (Appendix F) (Final Order). With regard to the juror-bias claim, the state court ruled that all juror testimony in both affidavits and depositions was inadmissible under Georgia law: "[T]he fact that some jurors exhibited certain prejudices, biases, misunderstandings as to the law, or other characteristics that are not conducive to neutral and competent fact-finding is not a basis for impeaching the jury's verdict." Dkt. No. 19-10 (Appendix F) at 99. The court explained:

> The Georgia Supreme Court has made clear that the affidavits, such as those submitted by Petitioner to this Court, are not admissible. In *Spencer v. State*, 260 Ga. 640 (1990), the Georgia Supreme Court held: "The general rule is that affidavits of jurors may be taken to sustain but not to impeach their verdict." O.C.G.A § 17-9-41. **Exceptions are made to the rule in cases where extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations.** *See, e.g., Hall v. State*, 259 Ga. 412 (383 S.E. 2d 128) (1989) and cases cited therein. Compare FRE 606 (b). (Footnote omitted.) The affidavit here does not fit within these exceptions to the rule. Compare *Shillcutt v. Gagnon*, 827 F2d 1155 (II) (7th Cir. 1987). *See also Wright & Gold, Federal Practice and Procedure*, Ch. 7, § 6074 at pp. 431-32. ("Most authorities agree that **the rule precludes a juror from testifying that issues in the case were prejudged,** a juror was motivated by irrelevant or improper personal considerations, **or racial or ethnic prejudice** played a role in jury deliberations." (Footnotes omitted.)) . . . *Spencer*, 260 Ga. at 643.

Id. at 99-100 (emphasis in original). Based on this analysis, the court concluded: "[A]s the juror depositions and Petitioner's affidavits with regard to these claims are inadmissible, Petitioner has failed to prove, with any competent evidence, that there was any juror misconduct...." *Id.* at

101. The state habeas court further ruled that, regardless, the juror misconduct claims, including the claim that Juror Gattie's racial prejudice invalidated the death sentence, were defaulted for failure to raise them on direct appeal, and that Mr. Tharpe had not shown cause and prejudice to overcome the default. *Id.* at 102-04. The court specifically observed that Mr. Tharpe had suffered no prejudice as he "has failed to show that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner, as required by the ruling in *McCleskey.*" Dkt. No. 19-10 (Appendix F) at 102 (citing *McCleskey v. Kemp*, 481 U.S. 279 (1987)). Based on these rulings, the court made no fact or credibility findings regarding the disputed facts in Mr. Gattie's and the attorneys' testimony.

C. Federal Habeas Proceedings

Mr. Tharpe filed his federal habeas petition on November 8, 2010, in which he raised a juror misconduct claim based, *inter alia*, on racial bias. Dkt. No. 1 at 16-17. He reasserted the claim in his amended petition. Dkt. No. 25 at 16-17. By Order dated August 18, 2011, the district court found the claim procedurally defaulted based on the state habeas court's analysis of the default in its Final Order. Dkt. No. 37 at 8-9 (Appendix E). Mr. Tharpe continued to pursue his other claims for relief that were not procedurally barred. The district court denied his petition on March 6, 2014, but issued a certificate of appealability ("COA") to address the claim that trial counsel provided ineffective representation in investigating and presenting mitigation evidence. Dkt. No. 65 (Appendix D). The Eleventh Circuit expanded the COA to include the question of Mr. Tharpe's intellectual disability. *Tharpe v. Warden*, Eleventh Circuit Case No. 14-12464, Order of July 30, 2014. The Eleventh Circuit affirmed this Court's denial of habeas relief on August 25, 2016. *Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016) (Appendix C).

On April 14, 2017, Mr. Tharpe filed a petition for writ of certiorari based on issues addressed in the Eleventh Circuit's opinion. That petition was denied on June 26, 2017. *Tharpe v. Warden*, 137 S. Ct. 2298 (2017).

While counsel were preparing to file Mr. Tharpe's petition for a writ of certiorari, this Court issued decisions in *Buck v. Davis*, 137 S. Ct. 759 (2017), and *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). Based on these two decisions and while the certiorari petition remained pending before this Court, Mr. Tharpe, on June 21, 2017, filed a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b) (6). Dkt. No. 77. Respondent, after receiving a requested extension of three weeks in which to respond, filed a response in opposition, Dkt. No. 89, and Mr. Tharpe filed a reply brief in support of his motion, Dkt. No. 93. On September 5, 2017, the district court denied relief, concluding that Mr. Tharpe's claim was barred by *Teague v. Lane*, 489 U.S. 288 (1989), and alternatively was procedurally defaulted. Dkt. No. 95 (Appendix B). The court denied a certificate of appealability. *Id.* at 22-23.

The next day, the State of Georgia obtained a warrant for Mr. Tharpe's execution permitting Mr. Tharpe's execution between Tuesday, September 26, 2017, and Tuesday, October 3, 2017.

On September 8, 2017, Mr. Tharpe filed an Application for Certificate of Appealability ("COA") and a separate Motion for Stay of Execution was filed on September 13, 2017. On September 21, 2017, a panel of the Eleventh Circuit denied the COA application and stay motion. *See* Appendix A. The panel ruled that the district court had not abused its discretion in denying the 60(b) motion because it "applied the correct legal standard and based its decision on findings of fact not clearly erroneous. Appendix A at 7. It further held that a COA should not issue to review the ruling because Mr. Tharpe had not "made a substantial showing of the denial

of a constitutional right" because, "[a]s the Butts County Superior Court and the District Court found, Tharpe failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict'" or that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal citation omitted) and *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Finally, the panel opined that "[i]f Tharpe is correct that *Pena-Rodriguez* applies retroactively in post-conviction proceedings and thus gives rise to a constitutional claim he could not have brought to the Butts County Superior Court, he is now free to pursue the claim in state court." *Id.* at 7-8. Judge Wilson concurred in the COA denial, noting that he would have granted COA in the case had he not concluded that the *Pena-Rodriguez* claim was not properly exhausted and accordingly that a stay should be granted and "the denial should be without prejudice so as to allow Tharpe a chance to re-file after it is properly litigated in Georgia state court." *Id.* at 9.[9]

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Mr. Tharpe's claim that one of his jurors was motivated to vote in favor of the death penalty on the basis of racial bias was raised in his First Amended Petition for Writ of Habeas Corpus filed in the Superior Court of Butts County, Georgia. *See* Dkt. No. 13-8 at 16. The state habeas court held that the evidence submitted in support of the claim was inadmissible under Georgia's law precluding jurors from impeaching their verdict and was otherwise procedurally defaulted. Dkt. No. 19-10 at 98-104. In federal habeas corpus proceedings, the district court

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[9] Although Mr. Tharpe argues below that his juror-bias claim was exhausted and the appropriate subject of a motion for relief from judgment under Rule 60(b)(6), he has also raised the claim anew, on the basis of the change in the law occasioned by *Pena-Rodriguez*, in a successive petition filed in state court on September 22, 2017.

found the claim procedurally defaulted as well. Dkt. No. 37 (Appendix E) at 8-10. Following this Court's rulings in *Pena-Rodriguez* and *Buck*, Mr. Tharpe moved to reopen this claim pursuant to Fed.R.Civ.Proc. 60(b)(6) on the basis of the new decisional law rendering his previously defaulted juror-bias claim cognizable, but the district court denied the motion and the Eleventh Circuit denied a certificate of appealability.

REASONS WHY THE PETITION SHOULD BE GRANTED

This Court has reaffirmed time and again that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.'" *Buck*, 137 S. Ct. at 778 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). Its cases reflect the Court's commitment to eradicating racial discrimination in the justice system. *See, e.g.*, *Pena-Rodriguez*, 137 S. Ct. at 867-68 (discussing cases). That commitment rings hollow if the State of Georgia is permitted to kill Mr. Tharpe without *any* judicial scrutiny of his long-standing and long-ignored claim that Juror Barney Gattie voted to impose the death penalty because Mr. Tharpe is black. That claim – supported by credible evidence, in the form of both sworn affidavits and live testimony, including Mr. Gattie's sworn statement that he voted for the death penalty because Mr. Tharpe is a "nigger" who killed a "'good' black" person and his flagrant, repeated and unabashed use of the word "nigger," a term that "is a universally recognized opprobrium, stigmatizing African-Americans because of their race"[10] – must not be swept under the rug any longer. This Court's intervention is necessary to prevent a grotesque and shocking perversion of justice.

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[10] *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993).

ARGUMENT

I. The Eleventh Circuit's Denial Of COA Was In Flagrant Disregard Of This Court's Instruction That A Court Of Appeals Should Limit Its Examination At The COA Stage To A Threshold Inquiry Into the Underlying Merit Of The Claim And Ask Only If The District Court's Decision Was Debatable.

28 U.S.C. § 2253(c) requires a certificate of appealability to be granted before a habeas petitioner may appeal from a final district court judgment denying relief.[11] A COA should issue where the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). When, as here, a COA seeks to address a district court's procedural ruling, the petitioner must show "that [the] procedural ruling barring relief is itself debatable among jurists of reason . . . ." *Buck*, 137 S. Ct. at 777. *See Slack, supra.* As this Court recently explained in *Buck*, the COA inquiry "is not coextensive with a merits analysis" and, "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). Here, Mr. Tharpe clearly met that standard in showing that reasonable jurists could disagree with the district court's denial of his Rule 60(b) motion on the ground that *Pena-Rodriguez* did not apply and that, regardless, the

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[11] The Eleventh Circuit requires issuance of a COA "before a habeas petition may appeal the denial of a Rule 60(b) motion." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1265 (11th Cir. 2015). *See also Buck*, 137 S. Ct. at 780 (Fifth Circuit erred in denying a COA to address procedurally defaulted claim of racial bias in capital sentence raised in Rule 60(b) motion).

state habeas court's failure to consider the evidence presented of Juror Gattie's racist views and their impact on the death sentence, nonetheless complied with *Pena-Rodriguez*.

A. Mr. Tharpe Appropriately Sought to Reopen the Judgment Under Rule 60(b)(6).

On the basis of this Court's recent decisions in *Pena-Rodriguez* and *Buck*, Mr. Tharpe moved to reopen the district court judgment in his case under Fed.R.Civ.Proc. 60(b)(6). That rule "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances, including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Rule 60(b)(6) "permits reopening when the movant shows 'any . . . reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rules 60(b)(1)-(5)."[12] *Id.*[13] While the Antiterrorism and Effective Death Penalty Act of 1996 has placed limits on Rule 60(b)'s application in federal habeas proceedings, it appropriately applies to cases like Mr. Tharpe's, which "attack[], not the substance of the federal court's resolution of a claim on the merits, but some defect in the

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[12] Grounds 1-5 permit judgment to be opened due to

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or misconduct by an opposing party; (4) the judgment is void; [and] (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable . . . .

Fed.R.Civ.Proc. 60(b).

[13] "This clause is a broadly drafted umbrella provision which has been described as 'a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses.'" *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984) (quoting 7 J. Lucas & J. Moore, Moore's Federal Practice para. 60.27[2] at 375 (2d ed. 1982)).

integrity of the federal habeas proceedings," *id.* at 532, in this case the preclusion of proof to support Mr. Tharpe's juror misconduct claim and the court's application of an overly burdensome prejudice standard to find the claim procedurally defaulted.

"Rule 60(b) vests wide discretion in the courts, but . . . relief under 60(b)(6) is available only in 'extraordinary circumstances.'" *Buck*, 137 S. Ct. at 777 (quoting *Gonzalez*, 545 U.S. at 535). Such circumstances must be determined on the basis of "a wide range of factors [that] may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Buck*, 137 S. Ct. at 778 (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-64 (1988)).

In *Buck*, the Court held that the district court had abused its discretion in denying a habeas petitioner's Rule 60(b)(6) motion, given proof that "Buck may have been sentenced to death in part because of his race." *Buck*, 137 S. Ct. at 778. This type of error represented a "disturbing departure from a basic premise of our criminal justice system," which "punishes people for what they do, not who they are," a departure "exacerbated because it concerned race." *Id.* Buck's trial counsel had knowingly presented expert testimony at Buck's penalty phase that Buck was more likely to be a future danger because he was black. *Id.* at 768-69. Trial counsel's ineffectiveness in this regard, however, was not raised on direct appeal or in his initial state postconviction proceedings, and, in federal habeas proceedings, was held to be procedurally defaulted and the merits of the claim were not reached. *Id.* at 770-71.

This Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), recognized a previously unavailable basis to excuse the procedural default of Buck's ineffective assistance claim and he accordingly sought relief under Fed.R.Civ.Proc. 60(b) to reopen his claim that his death sentence was tainted by his trial counsel's ineffectiveness in

presenting racially discriminatory expert testimony. The district court denied relief, concluding that Buck had not shown "extraordinary circumstances" and that he had failed to demonstrate the merits of the underlying claim as the expert's introduction of race was "*de minimis*" because the expert had only linked race and future dangerousness twice. *Id.* at 772. The Fifth Circuit denied a certificate of appealability to address the claim. *Id.* at 773.

This Court disagreed with the rulings from both lower federal courts. With respect to the district court's refusal to reopen the case under Rule 60(b)(6), the Court initially concluded that Buck succeeded on the merits of his claim that trial counsel were ineffective in presenting expert testimony linking Buck's race to his future dangerousness, given the centrality of the future dangerousness finding, the stark impropriety of presenting such testimony, and the likelihood that expert testimony on the subject influenced the sentencing jury. *Buck*, 137 S. Ct. at 776-77. The Court further repudiated the district court's conclusion that the criteria for granting the Rule 60(b)(6) motion was not met because the case did not present "extraordinary circumstances." Rather, the Court observed:

> Buck may have been sentenced to death in part because of his race. As an initial matter, this is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle. As petitioner correctly puts it, "[i]t stretches credulity to characterize Mr. Buck's [ineffective assistance of counsel] claim as run-of-the-mill." Brief for Petitioner 57.
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> This departure from basic principle was exacerbated because it concerned race.

Id. at 778. That such circumstances were "extraordinary" was "confirmed by what the State itself did in response to [the expert's testimony] in other cases," namely confessing error in five of the six cases the State had identified in which the expert had given such testimony. *Id.* at 778-79. Only Buck's capital sentence had been left untouched. *Id.* Given these circumstances, the

Court found, its recent decisions in *Martinez* and *Trevino* provided the mechanism for having Buck's ineffective-assistance claim finally determined on the merits.

B. Reasonable Jurists Could Debate Whether The District Court Properly Refused To Reopen The Case Because Mr. Tharpe Had Failed To Set Forth Sufficiently "Extraordinary" Circumstances.

Given this Court's strong condemnation of *the possibility* that Mr. Buck had been sentenced to death in part on the basis of his race, Mr. Tharpe clearly demonstrated that jurists of reason could debate the correctness of the district court's conclusion that Mr. Tharpe's juror-bias claim did not present similarly extraordinary circumstances. Although "something more than a 'mere' change in the law is necessary to provide the grounds for Rule 60(b)(6) relief," *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987), *Buck* clearly shows that that "something more" is presented here. First, the new law on which Mr. Tharpe relied not only, like *Buck*, provided a path for considering the merits of Mr. Tharpe's previously defaulted claim, but it also informed the merits review of that claim. More significantly, *Buck* shows that the subject matter of the claim – the likelihood that Mr. Tharpe was "sentenced to death in part because of his race" – is of exceptional importance, representing a "disturbing departure from a basic premise of our criminal justice system" heightened by the "odious" and "pernicious" taint of racial discrimination. *Buck*, 137 S.Ct. at 778. *See also Pena-Rodriguez*, 137 S. Ct. at 868; *cf. Liljeberg*, 486 U.S. at 864 (holding that relief under Rule 60(b) was appropriate to correct district court's failure to recuse itself based on circumstances creating the appearance of impropriety and noting that "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process").

Together, *Buck* and *Pena-Rodriguez* establish that reasonable jurists could disagree with the district court's decision to deny the Rule 60(b) motion on grounds that Mr. Tharpe's claim was not "extraordinary."[14] The Eleventh Circuit, however, fell into the same error made by the Fifth Circuit in *Buck*, "sidestep[ping] [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits," a practice that "in essence decid[es] an appeal without jurisdiction." *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336-37). Here, the Eleventh Circuit essentially interposed a merits-based rationale for denying COA, accepting the notion that the district court could reasonably have dismissed Mr. Gattie's racist remarks and testimony that he voted to impose the death penalty because Mr. Tharpe was a "nigger" who had killed someone Mr. Gattie considered "'good' black folk," as an "offhand comment" that did not "justify setting aside the no-impeachment bar to allow further judicial inquiry." Appendix A at 5 (quoting *Pena-Rodriquez*,

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[14] Mr. Tharpe also showed that reasonable jurists could debate the district court's conclusion that *Pena-Rodriguez* was a new rule of criminal procedure whose retroactive application was barred by *Teague*. As Mr. Tharpe showed, *Teague* did not apply at all because *Pena-Rodriguez* is a substantive evidentiary rule governing the consideration of evidence after a verdict has been returned and not a criminal procedural rule "designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Moreover, even if a rule of criminal procedure, it was not "new" because it was dictated by this Court's precedents securing a defendant's right to trial by an impartial jury and protecting against the pernicious effects of racism in the justice system. *See* COA Application at 18-24 (pdf pages 28-34); Reply Brief in Support of COA Application at 9-13 (pdf pages 15-19). *See also Spencer v. Georgia*, 500 U.S. 960 (1991) (Kennedy, J., concurring in denial of certiorari)(observing that the very claim decided in *Pena-Rodriguez* would not be *Teague*-barred if visited in federal habeas corpus proceedings).

The Eleventh Circuit sidestepped this issue, "assum[ing] for purposes of this case that *Pena-Rodriguez* is retroactive and applies in this post-conviction proceeding." Appendix A at 7. The district court's retroactivity ruling is, however, an essential component of its ruling that the Rule 60(b) motion failed to present adequate grounds for the grant of COA. As reasonable jurists may differ on whether *Pena-Rodriguez* applies retroactively, the district court's ruling on this ground presents yet another reason that a COA was appropriate in this case.

137 S. Ct. at 869). *See also id.* at 7 (approving district court's analysis as "appl[ying] the correct legal standard and bas[ing] its decision on findings of fact not clearly erroneous").

Because the Eleventh Circuit misapplied the COA standard by adjudicating the merits and failed to recognize that Mr. Tharpe's claim of juror bias is sufficiently weighty "to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773, this Court should grant certiorari, vacate the Eleventh Circuit's judgment, and either take this case up for full consideration or remand with instructions to the Eleventh Circuit to grant a certificate of appealability to address the propriety of relief from judgment.

II. The Eleventh Circuit's Conclusion That Mr. Tharpe Failed to Make a Substantial Showing of the Denial of a Constitutional Right Is In Flagrant Defiance Of This Court's Unwavering Commitment To Eradicating Racial Discrimination in the Justice System.

The Eleventh Circuit concluded that Mr. Tharpe had not "made a substantial showing of the denial of a constitutional right" because he "failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict.'" Appendix A at 7 (quoting *Brecht*, 507 U.S. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).[15] This statement is astonishing, given the abundant evidence Mr. Tharpe

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[15] The panel's reliance on *Brecht*'s harmless-error standard came out of left field, as no court or party previously mentioned it in addressing Mr. Tharpe's claim. It is certainly questionable whether the *Brecht* standard applies to a claim that a death sentence was impermissibly imposed on the basis of the defendant's race. Such a claim is structural in nature and is of the type that "require[s] reversal because [it] cause[s] fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (including among this type of claim that of a biased decisionmaker) (citing *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)). Regardless, it is impossible to fathom how Mr. Tharpe's claim that Mr. Gattie voted to sentence him to death because he is a "nigger" would not satisfy the *Brecht* standard. *See, e.g.*, *Buck*, 137 S. Ct. at 778 (describing the prospect that someone was sentenced to death because of his race "a disturbing departure from a basic premise of our criminal justice system" which "was exacerbated because it concerned race"); *Zant v. Stephens*, 462 U.S. 862,

presented in state court that Barney Gattie was an unapologetic racist who stated, in sworn testimony, that he sentenced Mr. Tharpe to death *because* Mr. Tharpe was a "nigger."

Mr. Gattie's language cannot be dismissed as a mere "offhand comment indicating racial bias or hostility." *Pena-Rodriguez*, 137 S. Ct. at 869. To the contrary, Mr. Gattie's statements, which must be taken as accurate assessments of his actual thoughts, given that *no court has ever engaged in any factfinding* on the topic of what Mr. Gattie may have actually said or meant, go to the very heart of the issue of whether Mr. Tharpe was sentenced to death because of his race.

Neither the district court, nor the Eleventh Circuit, considered that Mr. Gattie's free use of the word "nigger" was "by its very nature an expression of prejudice on the part of the maker" which, due to social condemnation, may have been "cloaked" once he was appearing in court.[16] *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986).[17] Yet, ignoring Mr. Gattie's use

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885 (1983) (noting that a defendant's race would be a "constitutionally impermissible or totally irrelevant" factor in the capital sentencing process).

[16] In *Pena-Rodriguez*, this Court noted "The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case . . . . It is quite another to call her a bigot." 137 S. Ct. at 869. That same stigma, of course, could have an equally chilling effect on a juror's willingness to implicate himself as a racist in open court.

[17] In *Heller*, the Eleventh Circuit vacated a conviction where the trial court had engaged in only a superficial inquiry into allegations that several jurors had made anti-Semitic remarks in the jury room. The court rejected the government's efforts to minimize the racial and religious slurs as made "purely in a spirit of jest" having "no bearing on the jury's deliberations. *Heller*, 785 F.2d at 1527. As the Eleventh Circuit forcefully stated:

> *[A]nti-Semitic "humor" is by its very nature an expression of prejudice on the part of the maker.* Indeed, in a society in which anti-Semitism is condemned, those harboring such thoughts often attempt to mask them by cloaking them in a "teasing" garb. A wolf in sheep's clothing is, despite clever disguise, still a wolf. Those who made the anti-Semitic "jokes" at trial and those who reacted to them

of language ignores the historical significance of his words. "Over the years, *nigger* has become the best known of the American language's many racial insults, evolving into the paradigmatic slur." Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word* 22 (Vintage Books ed. 2003). Juror Gattie's free use of the word, particularly coupled with his expressly racist views about integration, intermarriage, and souls, accordingly provided clear evidence of his entrenched racial bias, irrespective of Mr. Gattie's later claim that he used the word "nigger" to describe lazy, no-good white people as well as black people.

"It is beyond question that the use of the word 'nigger' is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination. This word is 'perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry.'" *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001) (ellipsis in original) (quoting Merriam-Webster's Collegiate Dictionary 784 (10th ed. 1993)). As numerous courts have recognized, "using the highly offensive racial slur 'nigger,' . . . constitutes direct evidence of discriminatory intent." *Kinnon v. Arcoub, Gopman & Assoc.*, 490 F.3d 886, 891 (11th Cir. 2007).[18]

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with "gales of laughter" displayed the sort of bigotry that clearly denied the defendant Heller the fair and impartial jury that the Constitution mandates.

Id. (emphasis added). The same holds true here.

[18] *See also, e.g., Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1229-30 (10th Cir. 2015) (citing cases "offer[ing] helpful commentary on the potentially strong polluting power of this [] time-worn word, 'nigger'"); *Umani v. Mich. Dep't of Corr.*, 432 Fed. Appx. 453, 459 (6th Cir. 2011) ("The use of the word 'niggers' is a racial slur 'irrespective of its common usage and without regard for the race of those who use it.'") (quoting *NLRB v. Foundry Div. of Alcon Indus.*, 260 F.3d 631, 635 (6th Cir. 2001)); *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 356 (8th Cir. 1997) ("[U]se of the word [nigger] even in jest could be evidence of racial

A juror's use of the word "nigger" is no less indicative of his or her racial bias. In *Bennett v. Stirling*, the district court granted habeas relief on a juror misconduct claim, finding that a juror's testimony that he "thought Petitioner was guilty 'because he was just a dumb nigger' [was] highly probative evidence establishing that the juror viewed black people as inferior to white people, and that he did not properly consider the evidence presented at trial." *Bennett v. Stirling*, 170 F. Supp. 3d 851, 870-71 (D.S.C. 2016), *aff'd on other grounds*, 842 F.3d 319 (4th Cir. 2016).[19] As the district court observed, "[I]t is difficult to imagine how the Juror could have stated his bias and its impact on Petitioner's sentencing more clearly. Moreover, if this blatant statement of racial hostility does not amount to evidence of constitutionally impermissible racial bias, it is hard to imagine what evidence could meet that standard." *Id.* *See also United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) (observing with respect to juror misconduct claim that "[w]e have considerable difficulty accepting the government's

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antipathy.") (quoting *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 114 (7th Cir. 1990)); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) ("Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment,' than the use of *an unambiguously racial epithet such as 'nigger'* by a supervisor in the presence of his subordinates.") (internal citation omitted) (emphasis added); *Brown*, 989 F.2d at 861 (finding that supervisor's "use of racial slurs [such as the word 'nigger'] constitutes direct evidence that racial animus was a motivating factor in the contested disciplinary decision," and noting that "[u]nlike certain age-related comments which we have found too vague to constitute evidence of discrimination, the term 'nigger' is a universally recognized opprobrium, stigmatizing African-Americans because of their race"); *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 514-515 (6th Cir. 1991) (supervisor's "use of the word 'niggers' cannot be characterized as harmless or casual. . . [T]he use of the racially derogatory word in juxtaposition with [the supervisor's] statement that he wanted to get rid of two of the three black employees employed at the school, if true, is evidence of racial animus").

[19] On appeal, the Fourth Circuit affirmed the district court's alternate ground for relief – that the prosecutor's racially charged closing argument violated due process. *See Bennett*, 842 F.3d at 325-28. That ruling "makes it unnecessary to consider Bennett's claim that the seating of a racially biased juror violated his right to an impartial jury." *Id.* at 328 n.*.

assumption that, at this time in our history, people who use the word 'nigger' are not racially biased").

Irrespective of Juror Gattie's efforts to backpedal from his initial sworn affidavit, his claim that he was not a racist because he used the word "nigger" to describe both black and white people rings hollow, given the word's well-established history and meaning, and other indications (such as his negative expressions about integration and skepticism that black people have souls) that his view of the world in general and Mr. Tharpe in particular was twisted by racial discrimination.[20] Despite his later assertion that he voted for death based solely on the evidence, his views on race – which he never disavowed – demonstrate that racial animus was inextricably tied to his decision-making in this case.

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[20] In *Bennett*, the district court discredited the juror's self-serving denial of being a racist:

> Federal courts do not "redetermine credibility of witnesses whose demeanor has been observed by the state trial court," *Marshall v. Lonberger*, 459 U.S. 422, 434 . . . (1983), but that does mean that federal courts always must find it reasonable for state courts to credit a witness's testimony to the exclusion of the entire record. The record in this case contradicts the Juror's denial of racial bias so thoroughly that no court could reasonably credit his denial. The Juror's statement that he believed Petitioner to be "just a dumb nigger" cannot be reconciled with his testimony that he did not view black people as inferior to white people. It is unreasonable to find that a juror who states that a black defendant is guilty "because he was just a dumb nigger" in fact had no racial bias regarding that person simply because he later proffers a bald denial of bias. Such denials are properly accorded little weight. *See, e.g., McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 558 . . . (1984) (Brennan, J., concurring in the judgment) (observing that "the bias of a juror will rarely be admitted by the juror himself"); *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) ("It is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their verdict deliberations, the jurors could have thus expunged themselves of the pernicious taint of anti-Semitism."); (Dkt. No. 107 at 32:3-16 (Respondents agreeing that people generally do not admit to being racists)).

Bennett, 170 F. Supp. 3d at 871.

The underlying merits of Mr. Tharpe's case are disturbing and set forth a more than colorable claim that his death sentence was the impermissible product of racial bias. This claim deserved encouragement to proceed further and the Eleventh Circuit accordingly should have issued a COA. Mr. Tharpe respectfully submits that this Court should grant certiorari, vacate the Eleventh Circuit's judgment, and either take this case up for full consideration or remand with instructions to the Eleventh Circuit to grant a certificate of appealability to address the Mr. Tharpe's claim that he should be granted relief from judgment.

III. The Eleventh Circuit's Determination That *Pena-Rodriguez* Created A New Claim That Mr. Tharpe Should Have Exhausted In State Court Is Inexplicable And Provides No Basis For The Court To Punt This Issue.

This Court's decision in *Pena-Rodriguez* did not create any new ground for vacating a verdict. Rather, the decision removed an impediment to a court's consideration of evidence showing that a jury verdict (or sentence) was the product of the racial bias of one or more jurors. Mr. Tharpe's claim that his death sentence was the unconstitutional, invalid result of Mr. Gattie's racist beliefs and invidious discrimination was first raised close to twenty years ago and *Pena-Rodriguez* did not transform that claim into something new and different.

Pena-Rodriguez (together with *Buck*) provided firm ground for Mr. Tharpe to seek relief from judgment under Rule 60(b)(6). It undermined the district court's original reliance on the state habeas court's procedural default of the juror bias claim in two distinct and important ways. The state habeas court had ruled inadmissible the entirety of Mr. Tharpe's evidence proving Juror Gattie's bias and its impact on Mr. Tharpe's death sentence, and further ruled that Mr. Tharpe had not shown prejudice sufficient to excuse any default because he "failed to show that any alleged racial bias of Mr. Gattie's *was the basis for sentencing* the Petitioner, as required by the ruling in *McCleskey*." Dkt. No. 19-10 (Appendix F) at 102 (emphasis added). Both of these

rulings were wrong under *Pena-Rodriguez*. First, *Pena-Rodriguez* establishes that the extensive evidence proving Juror Gattie's racist views and their direct impact on his decision to sentence Mr. Tharpe to death should have been admitted into evidence, despite Georgia's evidentiary rule precluding the presentation of juror testimony to impeach a verdict."[21] Second, the case establishes that the state court applied an incorrect and overly burdensome test to show harm from Mr. Gattie's presence on Mr. Tharpe's jury.

In *Pena-Rodriguez*, a non-capital sexual assault case, the defendant had sought to present affidavits obtained shortly after trial from two jurors who described a number of biased statements a third juror had made about Mexicans and the likelihood that the defendant was guilty based on his Mexican background.[22] *Pena-Rodriguez*, 137 S. Ct. at 861-62. The state trial

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[21] The state habeas court relied on the Georgia Supreme Court's decision in *Spencer v. State*, 260 Ga. 630, 643-44 (1990), which refused to create an exception to the no-impeachment rule for evidence of a juror's racial discrimination. *See* Dkt. No. 19-10 (Appendix F) at 99-100. There, the Georgia Supreme Court affirmed the trial court's exclusion of evidence of capital sentencing juror's racial bias, observing that "[t]he rule of juror exclusion . . . is sufficiently race-neutral that further protection is not required, and the evidence in the present case did not reach a level that would justify disregarding the rule. Other than the lone affidavit, Spencer offered no evidence that racial bias materially affected the jury's decision to convict him and to impose a death sentence." *Id.* at 644. *See Spencer*, 500 U.S. at 960-61 (Kennedy, J., concurring) (concurring in the denial of certiorari because of the belief that the issue would not be barred in federal habeas proceedings under *Teague*, and observing that "Spencer, a black man . . . convicted and sentenced to death by a jury made up of six whites and six blacks" had been precluded from presenting a juror affidavit alleging that "other jurors uttered racial slurs concerning petitioner during deliberations" and "that petitioner's race was an important factor in the decision of certain jurors to convict petitioner and sentence him to death"). The case did not reach federal habeas proceedings as Spencer was later found ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). *See Retardation Issue in Capital Cases*, The Augusta Chronicle, Mar. 15, 1999, available at http://chronicle.augusta.com/stories/1999/03/15/met_256216.shtml#.WUFVlmjyu70) (last viewed September 22, 2017).

[22] Specifically, the jurors testified in their affidavits that "Juror H.C." had expressed his belief in the defendant's guilt "because in [the juror's] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women," and other comments indicating the juror's conclusion that the defendant was guilty because he was Mexican and discounting the defendant's alibi because it was

court had ruled the evidence inadmissible under Colorado's evidence rule excluding jurors from impeaching their verdict and a divided state supreme court had affirmed. *Id.* at 862. This Court reversed.

This Court held that, in light of the preeminent importance of eradicating racial discrimination from our justice system, the near-ubiquitous evidentiary rule preventing jurors from impeaching their verdicts could not be applied to exclude probative evidence showing that racial bias affected a verdict. Rather, "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Pena-Rodriguez*, 117 S. Ct. at 869. As this Court explained, "there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubts on the fairness and impartiality of the jury's deliberations and resulting verdict [by] tend[ing] to show that racial animus was a significant motivating factor in the juror's vote to convict." *Id.*

Under *Pena-Rodriguez*, the affidavits and live testimony establishing Barney Gattie's entrenched racist views were admissible to prove that Mr. Tharpe's death sentence was the unreliable and unfair product of invidious discrimination and accordingly invalid under the Fifth, Sixth, Eighth and Fourteenth Amendments. The evidence, showing *inter alia* Juror Gattie's free use of the word "nigger," explaining how he divided African-Americans into "niggers" and "good black folks," and that he knew right away that he would vote to impose the death penalty

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presented by a witness the biased juror incorrectly dismissed as "an illegal." *Pena-Rodriguez*, 137 S. Ct. at 862.

in this case because Mr. Tharpe was a "nigger" while his victim was in the "good-black-folks" category tended to show that "racial animus was a significant motivating factor in the juror's vote to convict." *Pena-Rodriguez*, 137 S. Ct. at 869.

That test, clearly satisfied here, further demonstrates that the state habeas court applied an incorrect and overly burdensome standard in finding that Mr. Tharpe had not shown any prejudice to excuse his purported procedural default because he "failed to show that any alleged racial bias of Mr. Gattie's was *the basis* for sentencing the Petitioner." Dkt. No. 19-10 (Appendix F) at 102 (emphasis added). But *Pena-Rodriguez*'s clarification that the state court's prejudice analysis was wrong hardly establishes that *Pena-Rodriguez* created a "new" claim that, per the Eleventh Circuit, Mr. Tharpe should first have exhausted in state court. That conclusion is mystifying, given that Mr. Tharpe has been raising the same claim – that Juror Gattie's racism invalidates his death sentence – for close to twenty years.[23]

Pena-Rodriguez removed the impediment to consideration of the evidence Mr. Tharpe presented to support this claim. This Court must grant certiorari to ensure that some federal court gives it meaningful consideration on the merits.

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[23] Mr. Tharpe has argued that *Pena-Rodriguez* is not *Teague* barred because (1) it is not a rule of criminal procedure, (2) the evidentiary rule it modified itself is substantive in nature, and (3) regardless, the result was dictated by this Court's precedents securing the right to trial by an impartial jury and combatting the pernicious effects of racism in the justice system. *See* COA Application at 18-24 (pdf pages 28-34); Reply Brief in Support of COA Application at 9-13 (pdf pages 15-19). Should this Court construe *Pena-Rodriguez* to have set forth a new claim, however, it falls to this Court to declare the decision retroactive. *See* 28 U.S.C. § 2244(d)(1)(C). Given the decision's self-described place in this Court's long history of anti-discrimination decisions arising from the Court's "duty to confront racial animus in the criminal justice system," *Pena-Rodriguez*, 137 S. Ct. at 867-68, Mr. Tharpe respectfully submits this Court should declare the case fully retroactive.

CONCLUSION

"The jury is to be 'a criminal defendant's fundamental "protection of life and liberty against race or color prejudice."'" *Pena-Rodriguez*, 137 S. Ct. at 868 (quoting *McCleskey*, 481 U.S. at 310 (internal citation omitted). This Court must grant the Petition for Writ of Certiorari in order to ensure that the fundamental protection the jury is intended to confer is not grotesquely perverted by allowing the State to proceed with Mr. Tharpe's execution without ever having afforded him merits review of his disturbing claim, supported by credible evidence, that he was sentenced to death because in one juror's eyes he is a "nigger" who should be executed because of his race.

This 23rd day of September, 2017.

Respectfully submitted,

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COUNSEL FOR PETITIONER

No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, Warden
Georgia Diagnostic Prison,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail on counsel for Respondent as follows:

Sabrina Graham
Senior Assistant Attorney General
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Atlanta, Georgia 30334-1300
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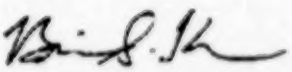
This 23rd day of September, 2017.



Attorney

No. 17-6075, 17-A330

RECORD AND BRIEFS

In the
Supreme Court of the United States

Keith Leroy Tharpe,
Petitioner,

v.

Warden, GDCP,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Eleventh Circuit utilize the appropriate standard for denying Petitioner's request for a certificate of appealability in accord with this Court's precedent?

2. Was the Eleventh Circuit's denial of Petitioner's certificate of appealablity correct?

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INTRODUCTION

Petitioner begins his brief by lamenting that no court has ever reviewed the merits of his juror racial bias claim. But the fault for that lies squarely at Petitioner's feet. During the state habeas proceeding, evidence from each of the jurors regarding Petitioner's juror bias claim was presented either live or in affidavit form. Following this presentation, briefing of both parties was ordered by the court. While Respondent briefed Petitioner's juror bias claim, Petitioner did not. He did not present any argument or evidence explaining to the court how he had shown cause and prejudice to overcome the default of his claim in order for the court to review his claim on the merits. Given this, the state habeas court reasonably concluded that Petitioner's claim was procedurally defaulted. Although the state court initially found Petitioner's juror bias evidence was not admissible, it alternatively assumed that even if Petitioner had admissible evidence, he had failed to show cause and prejudice to overcome the default of the claim. Petitioner did not raise a challenge to these findings in his application for certificate of probable cause to appeal in the Georgia Supreme Court.

Following his failure in state court, Petitioner gave his claim even less attention in his federal habeas proceeding. Despite being given more than one opportunity to do so, Petitioner did not specifically brief his claim to the federal habeas court. The court examined the issue and record and held Petitioner had failed to show cause and prejudice to overcome the default of his claim. Not once in any brief in federal court did Petitioner mention the facts of his claim. Additionally, Petitioner did not request a certificate of appealability for the district court's dismissal of his claim.

Then after this Court decided *Peña-Rodriguez v. Colorado*, __U.S.__, 137 S. Ct. 855 (2017), Petitioner requested that the federal habeas court reopen his 28 U.S.C. § 2254 proceeding under Federal Rule of Civil Procedure 60(b)(6). The district court once again looked at Petitioner's juror bias claim and found it was procedurally defaulted. In its examination of the default, the district court noted that the state habeas court had ultimately looked at Petitioner's evidence under the prejudice prong and found it did not prove that racial animus had been relied upon by the juror in sentencing Petitioner. The state habeas court was provided, by Petitioner, affidavit testimony from the juror Barney Gattie in which he provided racially discriminatory statements. However, Mr. Gattie then provided live and further affidavit testimony that race was not a motivating factor of the jury and answered many questions propounded by Petitioner in court that did not reveal Mr. Gattie harbored racial animosity toward black individuals. Additionally, the remaining eleven jurors, who all testified, did not state that race was considered during deliberations. The state habeas court, as found by the district court, made the credibility finding that racial animus had not been relied upon by the Mr. Gattie in sentencing Petitioner.

In denying the certificate of appealability (COA), the Eleventh Circuit Court of appeals heeded this Court's recent precedent, and did not go to the merits of Petitioner's claim. Instead the Court found, in summary fashion, that Petitioner's claim did not meet the COA standard. Petitioner has not shown that the court's decision was incorrect. Petitioner's claim is, without debate, still procedurally defaulted; and he has failed to show, in his case, *Peña-Rodriguez* lifted his default. Certiorari review is simply not warranted in this case.

STATEMENT OF THE CASE

A. Petitioner's Crimes

Petitioner Keith Tharpe's wife left him. *Tharpe v. State*, 262 Ga. 110 (1992). A month later, armed with a shotgun, he drove to a location he knew his estranged wife and sister-in-law would be passing on their way to work. *Id.* He blocked the road with his truck, forcing the two women to stop. *Id.* He then told his sister-in-law that he was going to "f---[her] up," took her behind his car, and shot her. *Id.* "He rolled her into a ditch, reloaded, and shot her again, killing her." *Id.* Tharpe then raped his wife and drove her to a bank, where he attempted to force her to withdraw money. *Id.* at 110-111. While at the bank, she was able to call the police and Tharpe was arrested. *Id.* at 111. The State charged Tharpe with murder and sought the death penalty. *Id.* at 110.

B. The Trial

Petitioner was found guilty of malice murder and two counts of kidnapping with bodily injury. *Id.* During the sentencing phase of trial, counsel tried to show Petitioner was a good person that had been temporarily overcome with emotional distress after being left by his wife. *Tharpe v. Warden*, 834 F.3d 1323, 1325 (2016). The jury voted unanimously to impose the death penalty finding three statutory aggravating factors according to O.C.G.A. § 17-10-30(b)(2) and (b)(7): the murder was committed while Petitioner was engaged in the commission of another capital felony, kidnapping with bodily injury of Jacquelin Freeman; the murder was committed while Petitioner was engaged in the commission of another capital

felony, kidnapping with bodily injury of Migrisus Tharpe; and the murder was outrageously or wantonly vile, horrible or inhuman because it involved an aggravated battery to the victim. *Id.* at 1326.

The Georgia Supreme Court affirmed the convictions and sentences on March 17, 1992. *Tharpe v. State*, 262 Ga. 110 (1992). Petitioner did not allege his juror misconduct claim at either the trial, the motion for new trial or on direct appeal. (ECF Nos. 10-2 at 118-19; ECF Nos. 12-5, 12-6, 12-7, 12-8). This Court denied certiorari review on October 19, 1992. *Tharpe v. Georgia*, 506 U.S. 942, 113 S. Ct. 383 (1992).

C. State Habeas Proceedings

On March 12, 1993, Petitioner filed his initial state habeas petition, (ECF No. 13-2), which he amended on December 31, 1997, (ECF No. 13-8), and on January 21, 1998 (ECF No. 13-10). In his first amended petition, Petitioner claimed that racial animus improperly infected the jury's deliberations. (ECF No. 13-8 at 16-17).

The state habeas court held multiple hearings where Petitioner's juror claim was addressed. Either through deposition or affidavit, sworn testimony was tendered before the state habeas court from each of the jurors. At the May 28, 1998, hearing, Petitioner tendered juror affidavits from Margaret Bonner, (ECF No. 14-3 at 4-6), Barney Gattie, (ECF No. 14-3 at 7-8), and James Stinson (ECF No. 14-3 at 36-38). The portion of Mr. Gattie's affidavit that is at issue in this case is the following:

In this affidavit, the relevant portion states:

> I . . . knew the girl who was killed, Mrs. Freeman. Her husband and his family have lived in Jones [C]ounty a long time. The

> Freemans are what I would call a nice Black family. In my experience I have observed that there are two types of black people. 1. Black folks and 2. Niggers. For example, some of them who hang around our little store act up and carry on. I tell them, "nigger, you better straighten up or get out of here fast." My wife tells me I am going to be shot by one of them one day if I don't quit saying that. I am an upfront, plainspoken man, though. Like I said, the Freemans were nice black folks. If they had been the type Tharpe is, then picking between life or death for Tharpe wouldn't have mattered so much. My feeling is, what would be the difference. As it was, because I knew the victim and her husband's family and knew them all to be good black folks, I felt Tharpe, who wasn't in the "good" black folks category in my book, should get the electric chair for what he did. Some of the jurors voted for death because they felt that Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason. The others wanted blacks to know they weren't going to get away with killing each other. After studying the Bible, I have wondered if black people even have souls. Integration started in Genesis. I think they were wrong. For example, look at O.J. Simpson. That white woman wouldn't have been killed if she hadn't have married that black man.

(ECF No. 14-3 at 7).

Subsequently, over two days, October 1-2, 1998, the state habeas court presided while the parties deposed eleven jurors: Barney Gattie, Lucille Long, Charles Morrison, James Stinson, Joe Thomas Woodard, Jason Simmons, Margaret Bonner, Mary Graham, Ernest Ammons, Martha Sandefur, and Polly Herndon. (ECF No. 15-6; ECF No. 15-7; ECF No. 15-8).

Mr. Gattie testified during the depositions that on the day he initially spoke to representatives from the Georgia Resource Center regarding Petitioner's case, which was the basis for the affidavit that was prepared, he had been drinking. (ECF No. 15-8 at 84-85). Mr. Gattie said when members of the Georgia Resource Center returned days later, he signed the affidavit that had been prepared by them, but he had been drinking that day because

it was a holiday. (ECF No. 15-6 at 42). Mr. Gattie specified that he had consumed a twelve pack of beer and a few drinks of whiskey before he signed the affidavit. (ECF No. 15-8 at 80).

Mr. Gattie also testified that he was not told by representatives of the Georgia Resource Center that it was an affidavit and what it was going to be used for. (ECF No. 15-6 at 42-43; ECF No. 15-8 at 83). Mr. Gattie testified that Ms. Holt from the Georgia Resource Center read him the affidavit because he did not have his glasses to read it himself. (ECF No. 15-8 at 81-83). Mr. Gattie testified that while the affidavit was being read to him, he was not really paying attention. (ECF No. 15-8 at 83). Mr. Gattie testified that he did not recall saying that he did not need to read the affidavit because it was all true. (ECF No. 15-6 at 42). Mr. Gattie testified that the affidavit acquired by the Georgia Resource Center had been "taken all out of proportion" and "was misconstrued." (ECF No. 15-6 at 56).

During the deposition, Mr. Gattie stated that he had used the word "nigger." (ECF No. 15-6 at 113). Mr. Gattie said that there are "white niggers" and there are "black niggers" and both are "no good."[1] *Id.* Mr. Gattie explained that he did not mean the word "nigger" as a racial slur. (ECF No. 15-6 at 114). Regardless of whether you are white or a black, if you commit a crime; do wrong; or do not work, Mr. Gattie would consider that person a "nigger." *Id.*

Mr. Gattie was asked many questions by Petitioner's counsel regarding his views on race, specifically black persons. Many of the questions were ruled irrelevant by the state habeas court—e.g. questions such as whether

[1] To be clear, Respondent is not in any way condoning the use of this racial slur, but is merely reporting the testimony of Mr. Gattie.

Mr. Gattie had read *Uncle Tom's Cabin* or whether his granddaughter would "not want a black doll" or whether she has any "black dolls." (ECF No. 15-6 at 64, 108-109). However, the questions Mr. Gattie was allowed to answer do not show evidence of racial animus towards black individuals. For example, Mr. Gattie agreed that racial discrimination was a serious problem in our country, felt that the Georgia State flag, at that time it held a Confederacy symbol, should be changed if it "offended people," testified that he would love a mixed-race grandchild the same as a white grandchild, and later explained that he had black foster grandchildren that were "welcomed just like the whites was." (ECF No. 15-6 at 79, 88, 93, 102-103). He also testified, in answer to specific questions, that he considered white and black people to be equal in intelligence and did not think blacks "no more than whites" brought violence. *Id.* at 100, 106.

Mr. Gattie also testified live before the state habeas court that the word "nigger" was not discussed at trial and the only subjects that were discussed was the evidence presented at trial. (ECF No. 15-6 at 118).

There was no evidence in the juror affidavits or depositions that racial bias was a part of the deliberations: affidavit of Margaret Bonner, (ECF No. 14-3 at 4-6); affidavit of James Stinson, (ECF No. 14-3 at 36-38); deposition of Lucille Long, (ECF No. 15-6 at 122-54; ECF No. 15-7 at 1-7); deposition of Charles Morrison, (ECF No. 15-7 at 8-34); deposition of James Stinson, (ECF No. 15-7 at 35-55); deposition of Joe Thomas Woodard, (ECF No. 15-7 at 56-90); deposition of Jason Simmons, (ECF No. 15-7 at 91-121); deposition of Margaret Bonner, (ECF No. 15-8 at 10-29); deposition of Mary Graham, (ECF No. 15-8 at 30-47); deposition of Ernest Ammons, (ECF No. 15-8 at 48-62); deposition of Martha Sandefur, (ECF No. 15-8 at 65-77); deposition of Polly

Herndon, (ECF No. 15-8 at 108-27); and affidavit of Tracy Simmons, (ECF No. 15-16 at 7-8).

Following the live depositions, on December 11, 1998, Petitioner tendered a juror affidavit from Tracy Simmons. He also tendered affidavits from various people from the Georgia Resource Center regarding their recollection of the circumstances under which Mr. Gattie's affidavit was obtained. Also on that date, Respondent tendered an affidavit from Mr. Gattie. In this rebuttal affidavit, Mr. Gattie testified that he was unaware when he was approached by representatives of the Georgia Resource Center that they were representing Petitioner. (ECF No. 15-17 at 13). Mr. Gattie testified that he voted to sentence Petitioner to death because of the evidence presented at trial and Petitioner's lack of remorse. *Id.* at 14. Mr. Gattie testified that race was never an issue at deliberations and that the word "nigger" was never used by any juror during deliberations. *Id.*

On December 4, 2008, the state habeas court entered an order denying habeas relief. (ECF No. 19-10). Regarding Petitioner's juror misconduct claim, the court found the juror affidavits and depositions were not admissible. (ECF No. 19-10 at 99-101). **The court, however, in the alternative found that if Petitioner's evidence was admissible, Petitioner's juror misconduct claim was procedurally defaulted and he failed to establish prejudice to overcome the default. (ECF No. 19-10 at 102-03).** Regarding cause, the court found: "Petitioner has failed to establish any state action as cause preventing him from raising these claims" or that ineffective assistance of counsel had been shown as cause to overcome the default. *Id.* In concluding there was no prejudice the court opined:

"Petitioner has failed to show that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner..." *Id.*

Petitioner filed an application for a certificate of probable cause with the Georgia Supreme Court. (ECF No. 19-12 at 1-48). In his application, Petitioner failed to allege that his death sentence was the result of juror misconduct. *Id.* The Georgia Supreme Court summarily denied the application. (ECF No. 19-15).

Petitioner filed a petition for writ of certiorari with this Court, which was denied. *Tharpe v. Upton*, 562 U.S. 1069, 131 S. Ct. 655 (2010).

D. Federal Habeas Proceedings

Petitioner filed his federal habeas corpus petition on November 8, 2010, and amended it on April 11, 2011. In both his original and amended habeas petitions, Petitioner claimed improper racial attitudes infected the jury's deliberations. (ECF No. 1 at 16-17; ECF No. 25 at 16-17). Issues of procedural default and exhaustion were briefed separately according to the district court's order. (ECF No. 24). The district court ultimately ruled that Petitioner's juror misconduct claim was procedurally defaulted and he failed to establish cause and prejudice to overcome the default. (ECF No. 37 at 8-10).

Petitioner was neither granted nor requested a COA on his juror misconduct claim. The Eleventh Circuit ultimately affirmed the district court's denial of relief. *Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016). This Court denied certiorari review. *Tharpe v. Sellers*, 137 S. Ct. 2298 (2017).

E. Rule 60(b)(6) Motion

On June 21, 2017, Petitioner filed a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6). (ECF No. 77). In this motion, Petitioner asked the district court to reopen his 28 U.S.C. § 2254 to reconsider his juror bias claim under this Court's recent decisions in *Peña-Rodriguez v. Colorado*, __U.S.__, 137 S. Ct. 855 (2017) and *Buck v. Davis*, __U.S.__, 137 S. Ct. 759 (2017). The district court entered an order denying Petitioner's motion on September 5, 2017. In its order, the district court found Petitioner's reliance on Peña-Rodriguez was barred by the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and in the alternative, found neither *Peña-Rodriguez* nor *Buck* provided an extraordinary circumstance under Rule 60(b)(6) to overcome the procedural default of his juror misconduct claim. (ECF No. 95). The Court also denied Petitioner a Certificate of Appealability. (ECF No. 95).

On September 8, 2017, Petitioner filed an Application for COA in the Eleventh Circuit and a subsequent Motion for Stay of Execution was filed on September 13, 2017. On September 21, 2017, the Eleventh Circuit entered an order denying Petitioner's Application for COA and Motion for Stay of Execution. *Keith Tharpe v. Warden*, Case No. 17-14027-P (September 21, 2017).

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's denial of COA was in accord with this Court's precedent as it answered the threshold question for granting a COA and did not perform a merits review.

Petitioner alleges the Eleventh Circuit did not answer the threshold question of whether it should grant his request for a COA, but instead, in violation of this Court's precedent, went directly to the merits of his juror bias claim. (Petitioner's brief, p. 15). It can hardly be said that the Eleventh Circuit's two paragraphs addressing whether a COA should be granted consists of a merits review of his juror bias claim. (Appendix A, pp. 7-8). Although the Eleventh Circuit does spend the first six of the nine page order setting out the procedural history, it does not undertake a merits review. In the two paragraphs, the Court acknowledged the standard and summarily found Petitioner had failed to meet it. *Id.* Consequently, Petitioner has failed to show the Eleventh Circuit's decision is not in accord with this Court's order.

As correctly stated by Petitioner, this Court recently reiterated in *Buck v. Davis*, that a "COA inquiry" "is not coextensive with a merits analysis." 137 S. Ct. at 773. This Court went on to state, "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). And this question should be answered "without 'full consideration of the factual or legal bases adduced in support of the

claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). The Eleventh Circuit did not stray from this directive.

In the first six pages, the Eleventh Circuit set out the relevant procedural history, including specific findings by the district court. (Petitioner's Appendix A, pp. 1-6). The Eleventh did not comment in the first six pages on the merits of Petitioner's juror misconduct claim nor did the court recite any facts from the record. Immediately following its brief notation of the district court's decision, the Court correctly identified the correct standards for granting a Rule 60(b)(6) motion[2] and a COA. *Id.* at 6-7. As an initial matter the Court assumed *Peña-Rodriguez* was retroactive for collateral review.[3] *Id.* at 7. Then, the court provided its first reason for denying the COA, which is limited to three sentences. It determined that Petitioner had failed to make a "substantial showing of the denial of a constitutional right" as both the state habeas and federal habeas court had found Petitioner had not shown juror "Gattie's behavior 'had a substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 7 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). The court then

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[2] The Eleventh Circuit summarily concluded that in denying Petitioner's Rule 60(b)(6) motion, the district court had "applied the correct legal standard and based its decision on findings of fact not clearly erroneous." (Petitioner's Attachment A, p. 7).

[3] Petitioner complains that reasonable jurists could debate whether *Peña-Rodriguez* is retroactive which "present[ed] yet another reason that a COA was appropriate in this case." (Petitioner's brief, p. 20, n. 14). Respondent asserts, as he did below, that *Peña-Rodriguez* is not retroactive for collateral review purposes and reasonable jurists could not debate this issue. However, as the Eleventh Circuit essentially resolved this issue in Petitioner's favor, he fails to explain how the court's decision in not in accord with this Court's precedent to warrant review of his petition.

summarily found that reasonable jurists could not debate that the district court correctly found Petitioner's claim was procedurally defaulted. *Id.*

As an alternative reason for denying the COA, the court also found that if *Peña-Rodriguez* is retroactive, Petitioner's claim had not been properly exhausted in state court. *Id.* at 7-8.

Nothing in the Eleventh Circuit's analysis shows that it conducted a merits analysis. After reviewing Petitioner's brief, the only specific allegation that Respondent could find that supports Petitioner's argument is the following:

> Here, the Eleventh Circuit essentially interposed a merits-based rationale for denying COA, accepting the notion that the district court could reasonably have dismissed Mr. Gattie's racist remarks and testimony that he voted to impose the death penalty because Mr. Tharpe was a "nigger" who had killed someone Mr. Gattie considered "'good' black folk," as an "offhand comment" that did not "justify setting aside the no-impeachment bar to allow further judicial inquiry."

(Petitioner's brief, p. 20).

Petitioner's allegation has no merit. Petitioner's allegation inserts findings not made by the court as the portion of the Eleventh Circuit's opinion that Petitioner cites to is part of the court's recitation of the district court's opinion. This portion does not contain any merits analysis, but merely reports what the district court found and cites to the portion of this Court's decision in *Peña-Rodriguez* that the district court was referring to:

> The District Court rejected Tharpe's argument that the Superior Court's default analysis failed to comply with that required by *Pena-Rodriguez*, by noting that in *Pena-Rodriguez*, the Supreme Court **"left discretion to the state trial court to determine if a juror's statement indicated he relied on racial animus to convict or sentence a defendant."** As the Supreme Court described in *Pena-Rodriguez*,

> [n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. **Whether the threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances,** including the content and timing of the alleged statements and the reliability of the proffered evidence.
>
> 137 S. Ct. at 869.

(Petitioner's Attachment A, pp. 5-6) (emphasis added).

Consequently, Petitioner has failed to show the Eleventh Circuit improperly conducted a merits review in denying his request for a COA. As the Eleventh Circuit's decision was in accord with this Court's precedent, certiorari review should be denied.

II. The Eleventh Circuit's denial of Petitioner's request for a COA was correct.

Petitioner alleges his verdict was the product of improper racial bias on the part of juror Gattie in violation of his Sixth Amendment right to an impartial jury. As stated above, in denying Petitioner's request for a COA, the Eleventh Circuit determined that: 1) reasonable jurists could not debate the correctness of the district court's finding of procedural default; 2) and Petitioner had failed to show the denial of constitutional right as the state and federal court's had found Petitioner had failed to show juror "Gattie's behavior" influenced the jury's verdict. In making these determinations, the

Eleventh Circuit assumed this Court's recent decision in *Peña-Rodriguez* is retroactive for collateral review purposes. Petitioner has failed to show the Eleventh Circuit's decision is incorrect. Nothing in *Peña-Rodriguez* suggests that the holding automatically removes a procedural default of a claim. And Petitioner failed to show his Sixth Amendment rights were violated under the standard announced in *Peña-Rodriguez*.

A. *Peña-Rodriguez* does not lift the procedural default bar of Petitioner's claim.

As stated above, the state habeas court initially found Petitioner's evidence of juror bias to be inadmissible. But then the court assumed the evidence was admissible, and found the claim was procedurally defaulted and Petitioner had not shown cause and prejudice to overcome the default.[4] During Petitioner's original federal habeas proceeding, Petitioner did not specifically brief this claim, despite being given more than one opportunity to do so, and the district court found the claim to be procedurally defaulted.[5] (CITE). In denying Petitioner's request to reopen his § 2254 proceeding under Rule 60(b)(6), the district court again found Petitioner's claim was procedurally defaulted. The Eleventh Circuit found that reasonable jurists could not debate the correctness of the district court's determination that Petitioner's claim was procedurally defaulted.

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[4] Of note, despite hearings before the state habeas court on this claim, Petitioner did not brief his juror bias claim in his post-hearing brief. Nor did he raise it in his CPC application to the Georgia Supreme Court.

[5] Given Petitioner's failure to ever brief his juror misconduct claim in either his original state or federal habeas proceeding, Petitioner's lament that no court has ever reviewed his claim on the merits rings particularly hollow. (*See* Petitioner's brief, p. 1).

1. No Cause

Petitioner fails to address how *Peña-Rodriguez* can be used as cause to overcome the procedural default of his claim. As such, Petitioner fails to show that *Peña-Rodriguez* is an extraordinary circumstance warranting the reopening of his case. The juror misconduct claim in *Peña-Rodriguez* was addressed on the merits as it came to this Court on direct appeal. As shown above, Petitioner has never specifically pled or proven cause to overcome the default of his claim. There is no language in *Peña-Rodriguez* suggesting that juror misconduct claims, even those alleging racial bias, are exempt from the procedural default bar. Reasonable jurists could not debate that *Peña-Rodriguez* does not create an extraordinary circumstance to show cause to overcome the default of Petitioner's claim.

The only cause argument Petitioner ever raised in any court was the general allegation that trial and appellate counsel were ineffective for not pursing his procedurally defaulted claims. Petitioner never offered specific argument and evidence explaining why his juror misconduct claim could not have been raised at trial or on direct appeal. As such, he has waived any opportunity to do so. *See generally Princeton Homes, Inc. v. Virone*, 612 F.3d 1324, 1329, n. 2 (11th Cir. 2010) ("It is well-settled that 'appellate courts generally will not consider an issue or theory that was not raised in the district court.'" (quoting *FDIC v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir. 1993) (citation omitted)).

Petitioner has had nearly two decades to explain to the state and federal courts why he waited until seven years after his trial to raise his juror misconduct claim, and has never done so. Peña-Rodriguez does not provide

the extraordinary circumstance for Petitioner to do so now and reasonable jurists could not debate this issue.

2. No Prejudice

Contrary to Petitioner's assertion, and assuming *Peña-Rodriguez* is retroactive, reasonable jurists could not debate that Petitioner has failed to show prejudice under the rule announced in *Peña-Rodriguez*. As correctly found by the district court, the state habeas court's prejudice analysis "comports with the analysis required by *Pena-Rodriguez*." (ECF No. at 19). Given the extremely narrow holding in *Peña-Rodriguez*, and the facts of Petitioner's case, Petitioner has failed to show that reasonable jurists could debate this determination.

Peña-Rodriguez is a threshold inquiry asking whether a juror has made "a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant." *Peña-Rodriguez*, 137 S. Ct. at 869. When this is satisfied, "the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* Based on this, if a court looks at the evidence and determines that no juror relied on racial stereotypes or animus to convict a criminal defendant, then the no-impeachment rule still applies. If the no-impeachment rule no longer applies, then Petitioner must "show that racial animus was a significant motivating factor in the juror's vote to convict" and this determination is "committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence." *Id.*

By-passing whether Petitioner had shown enough evidence to overcome the no-impeachment rule by assuming Petitioner did have admissible evidence, the state habeas court concluded that Petitioner's juror misconduct claim was procedurally defaulted. (ECF No. 19-10 at 102-03). In analyzing the prejudice prong, the state habeas court found Mr. Gattie testified "that he 'did not vote to impose the death penalty because [the Petitioner] was a black man' and that 'at no time was there any discussion about imposing the death sentence because [Petitioner] was a black man.'" *Id.* Thus, the state habeas court properly concluded: "Petitioner has failed to show that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner... ." (ECF No. 19-10 at 102). Petitioner fails to show how this determination did not comply with this Court's decision in *Peña-Rodriguez*.

As correctly pointed out by the district court and Eleventh Circuit, the determination of whether the evidence shows improper racial animus is left to the "discretion of the trial court" who must evaluate all of the circumstances surrounding the evidence. Petitioner faults all of the courts for not relying solely on the affidavit testimony he obtained from Mr. Gattie in determining his claim. But neither the state nor federal courts were under such a mandate. And contrary to Petitioner's implication, there is no proof that the state or federal court did not consider his evidence.

As correctly found by the district court, "The 'circumstances' presented in Tharpe's case are dissimilar from those in *Peña-Rodriguez*." (ECF No. 95 at 20-21). In *Peña-Rodriguez*, the juror was so overtly racist during deliberations that two jurors spoke to Peña-Rodriguez's attorneys about the racist comments immediately after trial. Here, every juror that was questioned, all remaining eleven, regarding the possibility of racial animus

during deliberations denied that any racial animus tainted the process. (ECF No. 15-7 at 4-5, 31, 53-54, 86, 118; ECF No. 15-8 at 26, 45-46, 60, 74-75, 125). Although Mr. Gattie made comments seven years after trial that could indicate racial bias, he denied that any bias affected his deliberations. (ECF No. 15-17 at 14).

During live testimony before the state habeas court, Mr. Gattie was subjected to rigorous examination by Petitioner's counsel regarding how his initial affidavit was obtained and what constituted his racial views. Mr. Gattie disputed that he had sworn to the accuracy of his affidavit, provided testimony that suggested the circumstances under which Petitioner's counsel had obtained the affidavit were questionable, and felt his statements to Petitioner's counsel had not been accurately reflected in his affidavit. Moreover, when allowed to answer Petitioner's counsel's myriad of questions designed to reveal racism, Mr. Gattie's answers did not show that he harbored racist views of black persons. Again, Respondent is not defending Mr. Gattie's use of the word "nigger" but is instead merely pointing out that Mr. Gattie's answers to counsel's question did not expose him as an individual who possessed racial animosity toward black persons. Nor did his answers reveal that Mr. Gattie had sentenced Petitioner based upon his race.

It was not unreasonable under the facts presented to the state habeas court to conclude that racial bias was not relied upon to sentence Petitioner. Mr. Gattie's racially insensitive remarks seven years after trial do not establish the racial animus necessary to meet the standard announced by this Court in *Peña-Rodriguez*. Moreover, the jurors denied that racial animus was a part of their deliberations. As correctly found by the district court, the state habeas court, after hearing the jurors testify live, made the

credibility determination that Mr. Gattie had not relied upon "racial stereotypes or animus to sentence Tharpe." (ECF. No. 95 at 21). *See Consalvo v. Sec'y for the Dep't of Corr.*, 664 F.3d 842, 845 (11th Cir. 2011) ("Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review."). Petitioner has not shown that the district court's finding that he had failed to show prejudice was incorrect.

As Petitioner has failed to show that under the *Peña-Rodriguez* standard the outcome of a motion for new trial or appeal on this claim would have been different, he has also failed to show a denial of Sixth Amendment rights. Although Petitioner's complains that the courts improperly channeled review of his claim under the prejudice standard, he does not explain how such a review did not result in proper consideration of his Sixth Amendment claim under *Peña-Rodriguez*. A prejudice analysis and a substantive review of his claim are essentially one in the same.

Petitioner alleges the Eleventh Circuit was in error in determining that he had failed to show a denial of his Sixth Amendment rights by finding that the state court and the district had determined "Gattie's behavior 'had a substantial and injurious effect or influence in determining the jury's verdict.'" (Petitioner's Appendix A at 7) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Although Petitioner takes issue with the Eleventh Circuit's use of the *Brecht* standard, that is in essence what the lower courts found—that Mr. Gattie's racial views, which did evidence some bias, did not unconstitutionally infect the jury's deliberations of Petitioner's sentence. And Petitioner has not shown that the courts' determination were incorrect.

Consequently, as the Eleventh Circuit correctly determined Petitioner had not made the necessary showing for a COA, Petitioner has failed to present an issue worthy of this Court's review.

III. The Eleventh Circuit's alternate denial of Petitioner's request for a COA because Petitioner had not exhausted his juror misconduct claim is irrelevant.

Petitioner complains that the Eleventh Circuit erroneously determined that if *Peña-Rodriguez* was retroactive, then he had not exhausted his claim in state court. Petitioner argues that *Peña-Rodriguez* did not create a new claim but merely altered the evidence that could be considered in reviewing the claim. Regardless of whether Petitioner's claim is exhausted the Eleventh Circuit's first reason for denying the COA is correct and in accord with this Court's precedent. Accordingly, this issue presents nothing warranting this Court's certiorari review.

CONCLUSION

For the reasons above, this Court should deny the petition for certiorari and Petitioner's request to stay his execution.

Respectfully submitted.

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September 26, 2017

CERTIFICATE OF SERVICE

I do hereby certify that I have this day, September 26, 2017, served the within and foregoing Pleading, prior to filing the same, by emailing, properly addressed upon:

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No. 17-6075

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, WARDEN
Georgia Diagnostic Prison,

Respondent.

THIS IS A CAPITAL CASE

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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No. 17-6075

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, WARDEN
Georgia Diagnostic Prison,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

Petitioner, Keith Tharpe, respectfully submits this Reply Brief in support of his Petition for a Writ of Certiorari to review the judgment of the Eleventh Circuit Court of Appeals, entered in the above case on September 21, 2017.

Respondent's ongoing efforts to prevent consideration of Mr. Tharpe's deeply troubling claim that one of his jurors voted to sentence him to death because he is a "nigger," rely on two basic premises.[1] First, he blames Mr. Tharpe for failing to prove his claim years ago under an

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[1] It must be noted that this issue is being litigated under warrant despite the fact that Mr. Tharpe promptly filed his Rule 60(b) motion in June 2017, and that it was Respondent who requested an additional three weeks to respond, ostensibly because new counsel was on the case. *See* Dkt. No. 85 at 2. That attorney, Katherine Iannuzzi, does not appear to be on the case any

erroneous standard that both the parties and the courts believed applied – a standard Mr. Tharpe could not satisfy on the evidence he was able to present and that accordingly justified his focus in earlier proceedings on other, potentially more winnable claims. Second, Respondent urges that the claim is and remains procedurally defaulted, even though the state court's procedural default analysis applied this same erroneous standard and, having ruled the evidence of Juror Gattie's racism inadmissible, failed to address any of it in finding Mr. Tharpe had not shown prejudice. Both arguments are specious. This Court must act to prevent the intolerable – the execution of an African-American man sentenced to death on the basis of his race.

I. Because Mr. Tharpe Properly Presented His Juror-Bias Claim In Both State And Federal Court, Respondent's Suggestion That He Abandoned The Claim Is Baseless.

In the district court, Respondent attempted to argue that Mr. Tharpe's racist-juror claim was unexhausted, Dkt. 89 at 7 n.2, but the district court rejected that claim as itself waived, Dkt. 95 at 4 n.3. Before the Eleventh Circuit, Respondent continued to insinuate that Mr. Tharpe neglected this claim for 20 years and therefore should not be heard to complain now. *See, e.g.*, Response in Opposition to Motion for Certificate of Appealability and Motion for Stay of Execution at 5, 9, 24, 25, 26-27. Before this Court, he claims that it is Mr. Tharpe's fault that no court has reviewed the merits of his claim because he was not sufficiently diligent in pursuing

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longer, as shown by her absence from the pleadings filed in the Eleventh Circuit and in this Court. *See* Respondent's Opposition to COA in CA 11 No. 17-14027; Respondent's Opposition to Petitioner's Motion for an Order Staying His Execution in CA 11 No. 17-14027; Brief in Opposition. Respondent, moreover, took a full week to respond to Mr. Tharpe's COA Application, despite the fact that Mr. Tharpe by that time was under warrant.

the claim. Brief in Opposition ("BIO") at 1-2. Respondent's complaints rest on his misconstruction of both the record and the Georgia's habeas corpus procedures.

Respondent's contention that Mr. Tharpe's juror-bias claim was not briefed is simply incorrect. The parties engaged in substantial briefing of the issue in litigating Mr. Tharpe's right to depose the jurors, as well as multiple days of hearings presenting evidence and argument regarding the claim. *See, e.g.* Dkt. 14-1 – 14-2; Dkt. 14-3 – 14-4; Dkt. 14-13 at 2-6; Dkt. 14-15 at 2-5; Dkt. 14-16 at 5-8, 10-14; Dkt. 15-1 – 15-2; Dkt. 15-13 – 15-14. There certainly can be no question that the state habeas court was aware of the issue and familiar with the law, as it devoted seven pages to the claim in finding the evidence to support the claim inadmissible and the claim procedurally defaulted. *See* Dkt. 19-10 at 98-104.

Georgia law did not require the issue to be further briefed in the post-hearing brief – indeed, Georgia's habeas corpus law does not require that issues be briefed at all by the parties. *See* Superior Court Rule 44.11 (providing that "[w]ithin 60 days after the evidentiary hearing, petitioner *may* file any brief and if so directed by the court *shall* file proposed findings of fact and conclusions of law and a proposed order") (emphasis added). Nor was Mr. Tharpe required to address the claim in his proposed final order. *See Williams v. State*, 274 Ga. 704, 704 (2001) (Carley, J., dissenting) (observing that the court had previously remanded the case to the state habeas court because that court had erred in finding that petitioner had "waived claims that he did not include in his proposed final order") (quoting prior unpublished order).[2] And, had the

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[2] Nor was there any requirement that the issue be fully briefed in Mr. Tharpe's application for a certificate of probable cause ("CPC") to appeal. Mr. Tharpe incorporated by reference all claims not briefed in his CPC application that had been raised in his amended petition and in the evidentiary hearings and motions in the case. *See* Dkt. 19-12, at 3 n.2. No more was required. Ga. Sup. Ct. Rule 22, providing that "[a]ny enumerated error not supported by argument or citation of authority in the brief shall be deemed abandoned" is a rule that applies

Georgia Supreme Court granted a CPC and heard the case on appeal, it would have been authorized to address the juror-bias claim, irrespective of whether Mr. Tharpe had raised it in his CPC application. *See Smith v. Francis*, 253 Ga. 782, 782 (1985) (noting that the grant of CPC "brings the entire case before this Court").[3]

In considering Mr. Tharpe's pursuit of this claim in both state and federal court, it cannot be overstressed that, prior to *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), Mr. Tharpe's juror bias claim was essentially dead in the water in Georgia and in this Circuit. In *Spencer v. State*, 260 Ga. 640 (1990), the case on which the state habeas court had relied in ruling Mr. Tharpe's evidence inadmissible, *see* Dkt. 19-10 at 100, the Georgia Supreme Court had held that evidence showing that "two white jurors [had made] racially derogatory comments about the

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to the briefing of *appellate briefs*. Ga. Sup. Ct. Rule 22. The court's rules clearly distinguish between appellate briefs and other forms of written submissions to the court. *See, e.g.*, Ga. Sup. Ct. Rule 20 (providing that "[b]riefs, petitions for certiorari, *applications for appeal*, motions, and responses shall be limited to 30 pages . . . ."). Mr. Tharpe's CPC application, a type of pleading not expressly identified in Rule 22, is accordingly not governed by that rule. *Expressio unius exclusion alterius*.

[3] As the Eleventh Circuit has observed:

> For every application for a certificate of probable cause, the Georgia Supreme Court must satisfy itself that the petitioner's claims are either procedurally defaulted or meritless.
>
> And, in fact, the Georgia Supreme Court thoroughly reviews the evidence and the petitioner's arguments before denying an application for a certificate of probable cause. The Georgia Supreme Court makes its decision with the aid of the complete record and transcript, which the clerk of the superior court is required to transfer to the clerk of the Supreme Court. . . . . The Georgia Supreme Court clearly understands that a summary denial of a certificate of probable cause is a determination that a prisoner's claims lack merit.

Wilson v. Warden, 834 F.3d 1227, 1233 (11th Cir. 2016), *cert. granted, Wilson v. Sellers*, 137 S. Ct. 1203 (2017).

defendant during the jury's deliberations" was inadmissible. The court excluded consideration of a juror affidavit indicating that another juror had stated, "A nigger deserves to be dead," and discussing the affiant's belief that race was an important factor in certain jurors' decisions to conviction the defendant and sentence him to death. *See* Petition for Writ of Certiorari in *Spencer v. Georgia*, Sup. Ct. No. 90-7435, at 12 (attached as Exhibit A to Reply in Support of Application for Certificate of Appealability, filed in Eleventh Circuit on September 19, 2017). *See also Spencer v. Georgia*, 500 U.S. 960 (1991) (Kennedy, J., concurring in denial of certiorari). Mr. Tharpe's racist-juror claim would have fared no better in the Eleventh Circuit prior to *Pena-Rodriguez*. *See, e.g., Dobbs v. Zant*, 963 F.2d 1403, 1407-1408 (11th Cir. 1992), *rev'd on other grounds, Dobbs v. Zant*, 506 U.S. 357 (1993). *See also Dobbs v. Zant*, 720 F. Supp. 1566, 1571-79, 1579 n. 26 (N.D. Ga. 1989) (rejecting claims that death sentence was invalid as a result of jurors' racial bias, rejecting consideration of juror affidavits and noting that "[w]hen a habeas petitioner challenges the prejudice of the jury, the standard is prejudice regarding the jury as a *whole*") (emphasis original).

As Respondent's counsel explained in state habeas proceedings:

> The burden is that Petitioner must prove that the decision makers, plural, in his case, acted with discriminatory purpose. That means they must prove that racial considerations played an integral role in his sentencing.

Dkt. No. 15-6 at 18-19.

> [E]xamining the *Dobbs* precedent, and *Dobbs* was reversed but not on this issue, in the 11th Circuit this case does represent the last word on this issue in the *Dobbs* case. Even in that case, where the judge even found that some of the jurors had some racial prejudices walking in, ***it is incumbent upon Petitioner to show that they acted, they being the decision makers in his case, acted with discriminatory purpose.*** And the Court specifically rejected anyh contention that background or general racial attitudes was a proper showing which supported any kind of nexus to show that the decision makers in *Dobbs*' case acted with discriminatory purpose.

> Again, the Court held that the jurors denied that race had any effect on their decision and nothing in the record indicated that the jurors acted with purposeful discrimination.
>
> Again, we would reiterate that the focus, if permitted at all, should be solely upon the inquiry of whether the decision makers acted with discriminatory purpose.

Dkt. No. 15-8 at 6-7 (emphasis added).[4] And this is the standard the state habeas court applied in finding that Mr. Tharpe had "failed to show that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner, as required by the ruling in *McCleskey*. See *McCleskey v. Kemp*, 481 U.S. 279 (1987)." Dkt. No. 19-10 at 103.

Despite the fact that the claim could not have prevailed in either state or federal court until this Court decided *Pena-Rodriguez*,[5] Mr. Tharpe has pursued his racist-juror claim in every

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[4] Counsel for Mr. Tharpe believed this was the standard as well: "In Mr. Tharpe's case, I believe he was sentenced to death in violation of the 8th and 14th Amendments because race impermissibly affected the decision makers." Dkt. No. 15-6 at 22.

[5] *Pena-Rodriguez* not only clarified that the Equal Protection Clause and the Sixth Amendment right to an impartial jury override the interests protected by the no-impeachment rule. The case also established a lower standard for proving a constitutional violation than that presumed by the courts at the time Mr. Tharpe's claim was first presented. In *Dobbs*, for instance, the Court rejected the petitioner's racial bias claim on the ground that "jurors denied that race had any effect on their decision, and nothing in the record indicates that the jurors acted with *purposeful discrimination*." *Dobbs*, 963 F.2d at 1408. *See also Dobbs*, 720 F. Supp. at 1579 and 1579 n. 26 ("Although the jurors possess some racial prejudices, and some more so than others, Dobbs has not shown that the jurors, either individually or as a whole, were influenced by prejudices that would make them favor the death penalty for a black person who murdered a white person. * * * When a habeas petitioner challenges the prejudice of the jury, the standard is prejudice regarding the trial jury as a *whole*.") (emphasis original). *Pena-Rodriguez*, however, clearly established that, to prevail, a defendant must show that "one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict" by proof that "racial animus was a significant motivating factor in the juror's vote to convict." *Pena-Rodriguez*, 137 S. Ct. at 869.

Although Mr. Tharpe was unable to meet the *Dobbs* standard in state habeas proceedings by showing the jury deliberations were thoroughly contaminated by jurors' racial bigotry, that standard no longer applies. Under *Pena-Rodriguez*, proof of Juror Gattie's racial bias and its express impact on his decision to vote for the death penalty suffices to invalidate Mr. Tharpe's death sentence.

forum in which he has appeared.[6] This Court should not be distracted from the grave error presented by Juror Gattie's virulent racism and its impact on Mr. Tharpe's death sentence by the procedural smokescreen Respondent seeks to create.

II. *Pena-Rodriguez* Clarifies That Both The State And Federal Courts Erred In Procedurally Defaulting Mr. Tharpe's Juror-Bias Claim.

Respondent insists that "*Pena-Rodriguez* does not lift the procedural default bar of Petitioner's claim." He urges that Mr. Tharpe has never explained "why he waited until seven years after his trial to raise his juror misconduct claim" and that *Pena-Rodriguez* "does not provide the extraordinary circumstances for him to do so now." BIO at 16-17.

Mr. Tharpe did not learn of Juror Gattie's racists views until state habeas counsel visited him while conducting routine post-conviction juror interviews. Dkt. No. 15-16 at 10-13, 17-26; Dkt. Nos. 77-6, 77-7, and 77-8. As the Georgia Supreme Court has recognized, trial counsel is obligated to interview jurors following the trial only "'*where there is evidence of juror misconduct* that might undermine the verdict . . . ." *Turpin v. Todd*, 268 Ga. 820, 827 (1997) (emphasis original) (quoting ABA Standards for Criminal Justice, Standard 4-7.3 (2d ed. 1980)). Here, as in *Todd*, "there was simply no evidence in this case that would have alerted trial or appellate counsel to the presence of any misconduct by the jury . . . ." *Id.* Mr. Gattie's affidavits and testimony, as well as the affidavits of Georgia Resource Center counsel, clearly establish that Mr. Gattie's racist remarks were not made to Mr. Tharpe or his counsel until well after Mr.

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[6] In *Reed v. Ross*, 468 U.S. 1 (1984), this Court "held that a claim that 'is so novel that its legal basis is not reasonably available to counsel' may constitute cause for a procedural default . . . ." *Bouseley v. United States*, 523 U.S. 614, 622 (1998) (quoting *Ross*, 468 U.S. at 16). Here, Mr. Tharpe did in fact raise his claim, again and again, despite the fact that existing precedent in state and federal court rendered his proof insufficient prior to *Pena-Rodriguez*. Surely, this was sufficient to have preserved the claim for review now.

Tharpe's state habeas petition had been filed and, upon discovery, were promptly brought to the state habeas court's attention. *See* Docs. 77-2, 77-3, 77-4, 77-5, 77-6, 77-7, 77-8. Mr. Gattie's voir dire, moreover, gave no hint that he harbored such virulent racist views, *see* Dkt. 11-3 at 85-99, and "the record reveals no other evidence that would have alerted trial or appellate counsel to the fact that jury misconduct . . . occurred at trial." This clearly constitutes "cause" to excuse the failure to raise the unknown racial-bias claim at the motion-for-new-trial or appellate stages of the case.

Respondent also defends the Eleventh Circuit's insistence that reasonable jurors could not debate the court's conclusion that Mr. Tharpe has not shown prejudice resulting from Juror Gattie's blatant racist beliefs because "[a]s correctly found by the district court, the state habeas court's prejudice analysis 'comports with the analysis required by *Pena-Rodriguez*," given "the extremely narrow holding in *Pena-Rodriguez*, and the facts of Petitioner's case . . . ." BIO at 17. This argument is baseless.

Mr. Gattie's sworn testimony that he sentenced Mr. Tharpe to death because he is a "nigger" who killed someone Mr. Gattie considered "'good' black folk," and Mr. Gattie's Bible-study-based musings about whether "black people even have souls" – testimony that Mr. Gattie *never* repudiated – clearly satisfies the test set forth in *Pena-Rodriguez* that to qualify as proof that a verdict was impermissibly tainted by a juror's reliance on "racial stereotypes or animus" a juror's "statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict [or sentence]." *Pena-Rodriguez*, 137 S. Ct. at 869. None of this evidence, which the state habeas court had ruled *inadmissible*, was given any consideration by the state habeas court in its analysis of prejudice. First, contrary to Respondent's contention that the state habeas court's default analysis "assumed the evidence was admissible," BIO at 15, the state

habeas court actually said only that it would find the claim defaulted "*even if* Petitioner had admissible evidence to support his claims of juror misconduct," Dkt. No. 19-10 at 102 (emphasis added). Moreover, the court did not address any of the evidence indicative of Juror Gattie's bigotry, stating only that Gattie had testified "that he 'did not vote to impose the death penalty because [the Petitioner was a black man' and that 'at no time was there any discussion about imposing the death sentence because [Petitioner] was a black man.'" Dtk. No. 19-10 at 102-03. Finally, even had the state habeas court considered the evidence of Mr. Gattie's racist beliefs, it analyzed prejudice under a standard this Court's *Pena-Rodriguez* decision has shown to be incorrect. *See* Dkt. No. 19-10 at 102 ("[T]his Court concludes that Petitioner has failed to show that any alleged racial bias of Mr. Gattie's was *the basis for sentencing the Petitioner*, as required by the ruling in *McCleskey*.").

Respondent's efforts to distinguish this case from *Pena-Rodriguez* by suggesting that any court could reasonably construe Barney Gattie's racist language and noxious beliefs, moreover, is thoroughly jaundiced and should cause this Court concern about the potential impact of allowing Mr. Tharpe to be executed despite this disturbing evidence. According to Respondent, "the determination of whether the evidence shows improper racial animus is left to the 'discretion of the trial court' who must evaluate all the circumstances surrounding the evidence." BIO at 18. Respondent urges that "[a]s correctly found by the district court, "The "circumstances" presented in Tharpe's case are dissimilar from those in *Pena-Rodriguez*." BIO at 18 (quoting ECF No. 95 at 20-21). For the reasons already set forth in the Petition for Writ of Certiorari, addressing the unambiguous racism expressed in the word "nigger" and the clear

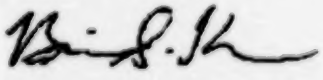
racist import of Mr. Gattie's first affidavit[7] – which he *never* repudiated – it is imperative that this Court reject Respondent's cynical efforts to downplay the evidence as proof of no more than an "offhand comment indicating racial bias or hostility." *Pena-Rodriguez*, 137 S. Ct. at 869. No reasonable construction of Barney Gattie's language can dispel the stench of racism wafting from his words.

CONCLUSION

This Court's commitment to the eradication of racial discrimination in the justice system is being tested in this case. For the reasons set forth in above and in Mr. Tharpe's petition for writ of certiorari, he respectfully asks this Court to grant the petition and prevent the miscarriage of justice that will occur if the State is permitted to execute him despite compelling proof that his death sentence was motivated by Juror Gattie's racist views.

This 26th day of September, 2017.

Respectfully submitted,



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[7] *See* Petition for Writ of Certiorari at 22-25.

No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, Warden
Georgia Diagnostic Prison,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail on counsel for Respondent as follows:

Sabrina Graham
Senior Assistant Attorney General
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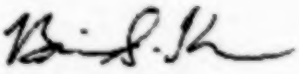
This 26th day of September, 2017.



Attorney